Supreme Court, U.S.
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No. _____ OFFICE OF THE

In The
Supreme Court of The United States
October Term 1998

DOROTHY JOSEPH,
Petitioner,

v.

THE NYC BOARD OF EDUCATION,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals decision conflicts with the well established case law from other Appellate Circuits and with other District Court decisions, thereby adversely affecting a rule of retroactive application of the 1991 Amendments to Title VII.

2. Whether the Second Circuit Court of Appeals erred in declining to retroactively apply the 1991 Amendments of the Civil Rights Act, §102(c) providing for a jury trial and compensatory and punitive damages to the Petitioner's claims of discriminatory denial of tenure and unlawful termination.

3. Whether this Court's decision in **Landsgraff v. USI Film Products, 114 S.Ct. 1483** provides for the retroactive application of the 1991 Amendments of the Civil Rights Act providing for a jury trial in instances where pre-enactment conduct had occurred and the case was filed after the amendments were enacted.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Respondent New York City Board of Education, on information and belief, is a quasi-municipal corporation located within the Eastern District of New York.

Petitioner Dorothy Joseph is a former educator who was employed by respondent New York City Board of Education for approximately thirty years. Specifically, petitioner was employed by respondent as a teacher, acting principal, assistant principal or principal from 1956 to August 1991 and as principal of P.S. 27 in Community School District 15 in Kings County, the borough of Brooklyn in New York City from September 1, 1987 to August 1991.

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Petitioner respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 16, 1999.

OPINION BELOW

The opinion of the Court of Appeals is reported at ____ F.3d _____ (2nd Cir. 1999), and appears at Appendix B. The opinion of the District Court is not reported. It appears as Appendix A.

STATEMENT OF BASIS FOR JURISDICTION IN THIS COURT

(A) The opinion sought to be reviewed was entered on March 16, 1999. (Apdx. A.).

(B) This Court has jurisdiction to review the judgment entered by the Court of Appeals for the Second Circuit, on a writ of certiorari pursuant to Supreme Court Rule 10 on the ground that this opinion conflicts with the decisions of another United States Courts of Appeals on the same important matter and this decision involves an important question of federal law that has not been, but should be, settled by this Court, specifically the retroactive application of the 1991 Amendments of the Civil Rights Act provisions providing for a jury trial and for compensatory and punitive damages.

CONSITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

The appropriate application of the provisions of the 1991 Amendments to the Civil Rights Act providing for a jury trial and compensatory and punitive damages is at issue in the instant case.

STATEMENT OF THE CASE

Background

The central issue on appeal is whether petitioner Dorothy Joseph is entitled to a jury trial and compensatory and punitive damages for her claims of discrimination in employment (denial of tenure and unlawful termination) based on race brought against Respondent New York City Board of Education under the 1991 amendments to Title VII of the Civil Rights Law of 1964, 42 U.S.C. §2000e et seq.. The United States District Court determined that petitioner Joseph's claims arose in June 1991 prior to the November 1991 enactment of the amendments to the Civil Rights Act providing for a jury trial and compensatory and punitive damages. The District Court further concluded that said amendments were not retroactive. The Court of Appeal for the Second Circuit affirmed the District Court's decision.

Petitioner Joseph's Employment With Respondent Board of Education

Petitioner Dorothy Joseph, an African-American woman, is claiming that respondent New York City Board of Education had discriminated against her based on her race in denying tenure to petitioner and terminating her employment as a school principal. Specifically, respondent Board employed Ms. Joseph in the capacity of teacher, acting

principal, assistant principal, or principal from 1956 to August 1991. From September 1, 1987 to August 1991, respondent Board employed Ms. Joseph in the capacity of principal of New York City Public School 27, in the Red Hook section of Brooklyn in Community School District 15. Pursuant to an agreement dated August 16, 1991 between Ms. Joseph and respondent Board, Ms. Joseph retired from respondent Board's employment and retained her rights to pursue contractual or legal remedies regarding denial of tenure.

By letter dated June 21, 1991 from then Community Superintendent of District 15, William Casey, petitioner was notified that Superintendent Casey was recommending that she be denied tenure as a school principal. In that same letter Ms. Joseph was notified of her contractual right to have the decision reviewed by the Chancellor's Committee. Ms. Joseph did, in fact, seek review and by letter dated February 4, 1992, after hearings before the Chancellor's Committee on November 8, 12, 15 and December 3, 1991, Chancellor Fernandez indicated his concurrence with the Committee's unanimous recommendation to deny Ms. Joseph tenure. By letter dated February 13, 1992 Superintendent Casey reaffirmed denial of tenure to Ms. Joseph indicating that it was based on his review of the Chancellor Committee's recommendation.

The Proceedings Below

Ms. Joseph filed a complaint with the New York State Division of Human Rights on March 6, 1992. Ms. Joseph subsequently received a right to sue letter and on June 24, 1994 filed a complaint against respondent Board in the United States District Court, Eastern District of New York. Ms. Joseph's complaint alleged that respondent Board, through the actions of Superintendent Casey, had engaged in a pattern of discrimination against P.S. 27 generally and Ms. Joseph specifically by, among other things, denying resources, thwarting efforts to improve school conditions, and failing to cooperate, and thereby manifested racial animus in denying plaintiff tenure and unlawfully terminating her employment. Ms. Joseph sought declaratory and injunctive relief as well as compensatory and punitive damages and, most importantly, a jury trial.

On December 24, 1996 respondent Board filed a motion to strike Ms. Joseph's demand for a jury trial and compensatory and punitive damages. By an unpublished Memorandum and Order dated February 3, 1997 the Honorable John Gleeson granted defendant's motion to strike Ms. Joseph's demand for a jury trial and compensatory and punitive damages. The Court entered judgment for respondent Board on February 2, 1998 after a bench trial. A Notice of Appeal was filed by Petitioner Joseph on February 27, 1998.

By its decision dated March 16, 1999 (Apdx. A), the Court of Appeals for the Second Circuit held that

The District Court had jurisdiction pursuant to federal question jurisdiction, 28 U.S.C.§1331, based upon the fact that Petitioner Joseph's complaint alleged a cause of action for discrimination in employment pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §2000e, et seq..

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291 as a final decision of the District Court.

REASONS FOR GRANTING THE WRIT

The District Court decision below gave inadequate weight to the legislative history of the Civil Rights Act of 1991 that, though not so stated in the Amended Act itself, Congress intended for the 1991 Amendments of the Civil Rights Act providing for a jury trial and compensatory and punitive damages in Title VII lawsuits filed subsequent to enactment whether or not the claims arose prior to enactment. Further, the Court failed to consider adequately the particular erroneousness of determining that petitioner Joseph's claims arose prior to enactment of the 1991 Amendments and denying the retroactive application of the Amendments to the instant case.

Here, although Petitioner Joseph received initial letter that Superintendent Casey recommended denial of tenure in June 1991, Petitioner Joseph engaged in a review process

which did not conclude until February 1992. Based on the applicable case law and the facts of the instant case, the District Court should have determined that Petitioner Joseph's case arose after the enactment of the 1991 Amendment, but, in any event, the Amendments should have been applied whether retroactively or not.

For these reasons, as well as the need for clarity as to the impact of this Court's earlier decision in Landgraf will have on claims of race discrimination, petitioner respectfully requests that this Court review the decision below.

I.

THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ERRONEOUSLY DENIED PETITIONER'S DEMAND FOR A JURY TRIAL AND COMPENSATORY AND PUNITIVE DAMAGES AND MISAPPLIED THE LANDGRAF DECISION

The 1991 Amendments to the Civil Rights Act §102 provide for a jury trial and compensatory and punitive damages in civil rights cases. In Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) this Court held "[s]ection 102 does not apply to a Title VII case that was pending on appeal when the 1991 Act was enacted". This Court further stated "We granted certiorari and set the case for argument with Rivers v. Roadway Express,

Inc., 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). Our order limited argument to the question whether §102 of the 1991 Act applies to cases pending when it became Law." **Id. at 251.**

Consideration of this matter by this Court is necessary to secure and maintain uniformity of the decisions in the Circuits. The decision below in this matter is contrary to the holdings of some other circuits and other district courts.

The Landgraf case did not involve a cause of action based on conduct that, as here, occurred both before and after November 21, 1991 and this Court made clear the issue for certiorari in Landgraf was the applicability of § 102 to cases then pending at the time of enactment.

As indicated in the facts above, Petitioner Joseph received notice of the recommendation for the denial of tenure in June 1991 from the Superintendent. It was not until February 1992, after Petitioner Joseph had participated in the process of review before the Chancellor's Committee, that she received notice of reaffirmation of the Superintendent's decision. The panel in the Second Circuit Court of Appeals erroneously concluded that in accordance with this Court's decision in **Delaware State College v. Ricks, 449 U.S. 250 (1980)** and New York Education Law, Petitioner Joseph's claim arose when she received notice in June 1991. (Apdx A, pp 11-14). The panel also erroneously concluded that Petitioner Joseph did not assert any claim that discriminatory conduct occurred after November 21, 1991 and, therefore, the

district court properly struck her demand for a jury trial. (Apdx A, p. 14). The panel seemed to ignore Petitioner Joseph's indication that in her complaint to the division of Human Rights she indicated that the actions Superintendent and the actions of the Chancellor and the Chancellor's Committee were discriminatory and were engaged in because she is Black. Moreover, the panel seemed to ignore that Petitioner Joseph's indication that in her complaint she refers to the defendant and its agents all of which would include the Superintendent, the Chancellor and the Chancellor's Committee.

II.

THE LEGISLATIVE HISTORY TO THE 1991 AMENDMENTS TO TITLE VII EVINCE CONGRESSIONAL INTENTION TO APPLY THE AMENDMENTS TO CASES FILED AFTER ENACTMENT

In November 1991, Congress enacted the Civil Rights Act of 1991 (Pub.L. 102-166, 105 stat. 1071 (1991)) which amended Title VII. The Civil Rights Act of 1991 included provision §102, which permitted litigants to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964 and provides for a trial by jury in cases where a litigant seeks such damages.

The Civil Rights Act of 1991 § 102 provides in pertinent part:

"(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

* * *

(c) Jury Trial.--If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury;" 42 U.S.C. 1981a(a) & (c)

While the language of §102 does not explicitly provide for retroactive application of the provision, the legislative history of the Civil Rights Act of 1991 is equivocal at best in supporting the position that such provision should not be applied retroactively. Indeed, one of the primary purposes of Congress in amending the Civil Rights Act was to eradicate discrimination throughout the economy and make whole those persons who had suffered from past discrimination. Landgraf v. USI Film Products, supra.

Indeed, this Court reviewed the legislative history of the Act in deciding Landgraf v. USI Film Products.

Refusal to retroactively apply the § 102 of the 1991 Amendments to such cases as the instant case would fly in the face of what appears to be the Congressional intent in enacting the Act.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Dated: Brooklyn, New York
June 14, 1999

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - -

August Term, 1998

(Argued: September 14, 1998 Decided: March 16, 1999)

Docket No. 98-7246

DOROTHY JOSEPH,

Plaintiff-Appellant,

- v. -

NEW YORK CITY BOARD OF EDUCATION,

Defendant-Appellee.

Before: KEARSE, Circuit Judge, and POLLACK* and CASEY**, District Judges***.

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*Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

**Honorable Richard Conway Casey, of the United States District Court for the Southern District of New York, sitting by designation.

***Pursuant to 28 U.S.C. § 46(b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by an emergency panel consisting of one judge from this Court and two judges of the United States District Court sitting by

Appeal from a judgment of the United States District Court for the Eastern District of New York, John Gleeson, Judge, dismissing plaintiff's claim for discriminatory denial of tenure and termination of employment, 42 U.S.C. § 2000e et seq., following a bench trial.

Affirmed.

LISA L. GEORGE, New York, New York (Barrett Gravante Carpinello & Stern, New York, New York, on the brief), for Plaintiff-Appellant.

TIMOTHY J. O'SHAUGHNESSY, New York, New York (Michael D. Hess, Corporation Counsel for the City of New York, Kristin M. Helmers, New York, New York, on the brief), for Defendant-Appellee.

HON. CLARENCE NORMAN, JR., HON. MAJOR OWENS, Brooklyn, New York (Lisa L. George, New York, New York, on the brief), filed a brief as Amici Curiae in support of Plaintiff-Appellant.

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designation.

KEARSE, Circuit Judge:

Plaintiff Dorothy Joseph appeals from a final judgment of the United States District Court for the Eastern District of New York, John Gleeson, Judge, dismissing her complaint alleging principally that defendant New York City Board of Education ("Board of Education" or "Board") denied her tenure and terminated her employment as a school principal on account of her race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994) ("Title VII"). Following a bench trial, the district court found that Joseph had not carried her burden of proving that the adverse employment decisions were the result of racial animus. On appeal, Joseph contends principally that under the 1991 amendments to Title VII, codified at 42 U.S.C. § 1981a (1994) ("1991 Amendments"), she was entitled to trial by jury and that, even if she had no right to a jury trial, the district court erred in ruling, following the bench trial, that she had failed to carry her burden of establishing intentional racial discrimination. Finding no basis for reversal, we affirm.

I. BACKGROUND

Joseph, an African-American, was employed by the Board of Education from 1956 until 1991. In 1987, she was appointed principal of Public School 27 ("PS 27"), an elementary school located in the Red Hook section of

Brooklyn, a largely poor neighborhood with a predominantly black and Latino population and a history of high crime rates and drug problems. As a new principal, Joseph was to serve a three-year period of probation, during which her performance was to be evaluated. At the end of the third year, the parties agreed that Joseph's probation would be extended for one year.

PS 27 was one of approximately two dozen schools located in Community School District 15 ("District 15"). For most of Joseph's probationary period, her supervisor was William P. Casey, a Caucasian, who held the position of District 15 superintendent.

A. Termination of Joseph's Employment as Principal of PS 27

In order to be granted tenure, a probationary principal was required to receive "Certification of Completion of Probation." As set forth in greater detail in Part II.B. below, through most of Joseph's four-year probationary term, Casey expressed criticisms of her performance. On June 21, 1991, near the end of the four-year period, Casey sent Joseph a letter ("June 21, 1991 letter") stating that he was denying Joseph "Certification of Completion of Probation," and stating that her appointment as principal of PS 27 would "terminate as of the close of business on August 25, 1991."

Pursuant to the pertinent collective bargaining agreement, this tenure denial was reviewed by a committee

designated by Schools Chancellor Joseph Fernandez (the "Chancellor's Committee" or "Committee") on November 8, 12, and 15, and December 3, 1991. The Committee recommended that Fernandez concur in Casey's decision; Fernandez concurred, by letter to Casey dated February 4, 1992. Casey sent Joseph--who by then had reached an agreement with the Board of Education allowing her early retirement--a letter dated February 13, 1992, reaffirming his decision.

B. The Present Action

In June 1994, Joseph commenced the present action, alleging that, in denying her tenure and terminating her employment as principal of PS 27, the Board of Education had discriminated against her on the basis of race. Joseph alleged, inter alia, that she was treated differently from the other principals in District 15, all but one of whom were white, and differently from all previous principals of PS 27, all of whom were white. She also contended that PS 27 was accorded less support from District 15 than were schools with white principals and a higher percentage of white students. Joseph demanded, inter alia, a jury trial, invoking the 1991 Amendments.

Following the completion of discovery, the Board moved, to the extent pertinent here, to strike Joseph's demand for a jury trial. The Board contended that the claims asserted by Joseph challenged conduct that occurred prior to

November 21, 1991, and that the 1991 Amendments were not applicable because they became effective on November 21, 1991, and were not retroactive.

In a Memorandum and Order dated February 3, 1997 ("1997 Opinion"), the district court granted the Board's motion. Noting that Joseph was notified of the denial of tenure by the June 21, 1991 letter and was informed at that time that her employment as principal of P.S. 27 would terminate on August 25, 1991, the court concluded that "state law is clear that the decision was final at the time it was made by the superintendent," i.e., June 21, 1991:

> Both parties agree that in order for plaintiff to be entitled to the benefits of the 1991 Amendments, her claim must have ripened after November 21, 1991. A claim ripens when the plaintiff receives definite notice of discharge. Miller v. International Telephone and Telegraph, 755 F.2d 20, 23 (2d Cir. 1985). The question presented is whether plaintiff received such notice prior to November 21, 1991.

The New York State Education Law, § 2573(6), states:

> In a city having a population of four hundred thousand or more, at the expiration of the probationary term of any persons appointed for such term, the superintendent of schools

> shall make a written report to the board of education recommending for permanent appointment those persons who have been found satisfactory and such board of education shall immediately thereafter issue to such persons permanent certificates of appointment.

N.Y. Educ. Law § 2573(6) (McKinney 1994).

> Under a literal reading of this law, the decision not to retain a principal beyond the probationary period is within the sole province of the district superintendent. Section 2573 contains no provision for review or reversal of these decisions by the chancellor of the central board.
>
> Additionally, the New York State Court of Appeals has repeatedly examined this provision of the Education Law and has clearly stated that the law applies as written. The discretion to grant tenure to a principal upon completion of the probationary period lies exclusively with the district superintendents. Matter of Taylor v. Berberian, 61 N.Y.2d 613, 471 N.Y.S.2d 843 (N.Y. 1983). The language of § 2573 also denotes a duty on the part[] of the community school board to comply with the tenure

recommendations of the superintendent. Matter of Caraballo v. Community School Bd. Dist. 3, 49 N.Y.2d 488, 492-93, 426 N.Y.S.2d 974, 976 (N.Y. 1980).

Additionally, Joseph has submitted a portion of the Board of Education Pedagogical Review Manual, published by the Board's Office of Appeals and Reviews. This manual clearly states that tenure decisions of district superintendents are final. See Plaintiff's Exhibit G at 25. The manual does not state that the findings of these reviews, subsequent votes by the local board, or recommendations of reversal by the Chancellor are binding on the district superintendent. Indeed, the manual states that the district superintendent can stand on his or her original decision, regardless of the recommendations of the Chancellor's report. See Plaintiff's Exhibit G at 30. Based upon the applicable law, its interpretation by the Court of Appeals, and the internal regulations of the Board of Education, plaintiff was terminated pursuant to the June 21, 1991 letter.

1997 Opinion at 4-6 (footnotes omitted). The court observed that

[t]he plaintiff in Caraballo was an

elementary school principal who was "recommended" for tenure by the district superintendent. However, the district school board refused to issue the Certification of Appointment officially granting tenure. The Court of Appeals held that the district school board's function was essentially ministerial, and thus it could not reverse the decision of the district superintendent. Caraballo, 49 N.Y.2d at 492.

1997 Opinion at 5 n.2.

The district court also noted that in Delaware State College v. Ricks, 449 U.S. 250 (1980), the Supreme Court

> held that a discrimination action ripened when the Ricks plaintiff was notified that he was not getting tenure, not when the grievance was denied. Hearing a grievance or an appeal is an effort to change a prior decision, not to influence the decision before it is made. Id. at 261. Aspirants for academic tenure should not ignore available opportunities to request reconsideration, but such requests cannot extend the limitations periods applicable to civil rights laws. Id. at 261, n.15.
>
> As in the Ricks case, Joseph was denied tenure and was given the opportunity for review by another body. In both instances,

> the discriminatory action took place when the tenure decision was made, not when collateral reviews became final. This initial denial of tenure is the wrong for which plaintiff seeks a remedy.

1997 Opinion at 7. The court also stated that

> [e]ven if this court were to allow the plaintiff to use her actual discharge date, August 25, 1991, as the date when her claims ripened, that date is still prior to the enactment of the 1991 Amendments, so she still would not be entitled to a jury trial . . . .

Id. at 6 n.3.

A four-day bench trial ensued. Following the trial, the district court found, as set forth in greater detail in Part II.B. below, that Joseph had failed to prove that Casey's decision was the result of intentional racial discrimination. Judgment was entered dismissing the complaint, and this appeal followed.

II. DISCUSSION

On appeal, Joseph contends principally that she is entitled to a new trial before a jury on the ground that her claims arose after November 21, 1991, following the Chancellor's February 1992 approval of Casey's decision. She also contends, if she was not entitled to a jury trial, that

the district court erred in ruling against her on the merits. We reject both contentions.

A. Applicability of the 1991 Provision for Jury Trial

Prior to the 1991 Amendments, a Title VII plaintiff had no right to seek relief in the form of money damages. See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 252 (1994); Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-21 (1975). Further, prior to those amendments, the Supreme Court had never recognized a Title VII plaintiff's right to a jury trial. See, e.g., Landgraf v. USI Film Products, 511 U.S. at 253-54 n.4; Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 549 n.1 (1990) (assuming without deciding that there was no right to a jury trial). The 1991 Amendments grant a plaintiff the right to seek damages for intentionally discriminatory treatment in employment in violation of Title VII, see, e.g., 42 U.S.C. § 1981a(a), and further provide that "[i]f a complaining party seeks . . . damages under this section . . . any party may demand a trial by jury," id. § 1981a(c).

The 1991 Amendments became effective on November 21, 1991, and the Supreme Court has ruled that the provisions of § 1981a allowing a plaintiff to recover money damages do not apply to cases arising before their enactment, see Landgraf v. USI Film Products, 511 U.S. at 282-86, i.e., do not apply "to conduct occurring before November 21, 1991," id. at 282. Since the right to a jury trial is expressly linked to a request for damages allowable under § 1981a, the

right to a jury trial also does not apply when the conduct complained of occurred prior to November 21, 1991. See Landgraf v. USI Film Products, 511 U.S. at 281.

In order to bring her case within the ambit of the 1991 Amendments, Joseph argues principally that the conduct of which she complains was not completed until February 4, 1992, at the earliest, when the Chancellor concurred in Casey's decision not to grant Joseph tenure. The law is, however, to the contrary.

A claim under Title VII for a discriminatory denial of tenure arises when the employee receives definite notice of the tenure decision. See Delaware State College v. Ricks, 449 U.S. 250, 258-59 (1980). This is so even if the actual discharge date is later, see id. at 259, and even if the tenure denial is subject to a grievance procedure, administrative review, and possible reversal, see id. at 260-61. Similarly, a claim for discriminatory discharge arises when the employee receives "a definite notice of the termination." Miller v. International Telephone & Telegraph Corp., 755 F.2d 20, 23 (2d Cir.), cert. denied, 474 U.S. 851 (1985). In Delaware State College v. Ricks, for example, a tenure committee voted in March 1974 to deny the plaintiff tenure, and the plaintiff commenced a grievance proceeding. On June 26, 1974, the college sent Ricks a letter officially informing him of the tenure decision. The Supreme Court held that the date on which Ricks's denial-of-tenure claim arose was no later than June 26, 1974, the date the letter was sent, even though at that

time the grievance proceeding was ongoing. See id. at 262 & n.17.

In the present case, as discussed by the district court in its 1997 Opinion, described in Part I.B. above, Joseph was notified of Casey's decision to deny her tenure in June 1991, and that decision was final under New York law. Tenure decisions affecting New York City public school principals are governed by the New York Education Law, see N.Y. Educ. Law § 2573(6) (McKinney 1995 & Supp. 1999), which, in New York City, vests plenary power over such decisions in the district superintendents. See, e.g., Matter of Taylor v. Berberian, 61 N.Y.2d 613, 615, 471 N.Y.S.2d 843, 843 (1983) ("In cities having a population of 400,000 or more, the discretion to grant tenure to a principal upon completion of his or her probationary period lies exclusively in the superintendent of schools . . . ."); Matter of Caraballo v. Community School Board District 3, 49 N.Y.2d 488, 491-93, 426 N.Y.S.2d 974, 976 (1980) (reversing community school board's refusal to accede to the district superintendent's tenure recommendation).

Similarly, the pertinent regulations of the Board of Education, introduced by Joseph at trial, provide that the decision of a district superintendent to deny a probationary principal Certification of Completion of Probation, thereby preventing the principal from gaining tenure, is final. See N.Y.C. Board of Education Regulations and Procedures for Pedagogical Ratings 23-25. Although the superintendent's

denial of tenure to a probationary principal is reviewed by a Chancellor's Committee, which prepares a report, and then by the Chancellor himself, who sends a recommendation to the superintendent, the superintendent is entirely free to accept or reject that recommendation. See id. at 29-30. The regulations provide that if the superintendent "stands on the original decision upon review of the [Committee] Report, no further action is required." Id. at 30. Thus, the reviews of the district superintendent's denial of tenure to a probationary principal are entirely advisory.

Accordingly, Casey's decision to deny Joseph tenure and terminate her appointment as PS 27's principal was final as of the time it was made in June 1991. His February 1992 letter to Joseph reaffirming that decision did not make his initial decision any less final. Since Joseph has not asserted any claim that discriminatory conduct occurred after November 21, 1991, the district court properly struck her demand for a jury trial.

B. The Challenges to the District Court's Ruling on the Merits

Joseph contends that even if she was not entitled to a jury trial, the judgment dismissing her complaint should be reversed because the district court erred in assessing the evidence presented at the bench trial. Stating that the district court "held that defendant had come forward with 'overwhelming evidence' of a nondiscriminatory reason for

the denial of tenure to Ms. Joseph," but that "the District Judge did not articulate those nondiscriminatory reasons which comprised such 'overwhelming evidence'" (Joseph brief on appeal at 10), Joseph argues that the court's failure to find racial discrimination was error "as a matter of law" (id. at 29) because the court failed properly to weigh the evidence. (See, e.g., id. at 28 (court "assigned no weight to the fact that plaintiff-appellant had inherited a 'failing' school where the math and reading scores of the students on standardized tests were chronically low"); id. ("gave no weight to the testimony of plaintiff-appellant and her witnesses that because the student population was predominantly Black and Hispanic and she was a Black principal that the school received few resources from the Superintendent and the District"); id. at 28-29 (erred in "declining to give any weight to the documentary evidence and testimony of the plaintiff-appellant's witnesses and [in] crediting the testimony of Superintendent Casey regarding his claim that neither he nor the district while he was in charge engaged in benign neglect of PS 27").) Joseph contends that

> [t]he course of conduct which the superintendent and the District followed was one that was bound to result in Ms. Joseph and PS 27 "failing" and, ultimately, exclusion of Ms. Joseph from serious consideration for tenure and even the ultimate denial of tenure. Thus, the result "bespeaks discrimination" and

> no evidence that it was caused by racial animus was necessary for a finding of intentional discrimination in violation of Title VII.

(Id. at 29.) These contentions are both legally and factually flawed.

A plaintiff who claims racial discrimination in the denial of tenure and the termination of employment in violation of Title VII has the ultimate burden of proving, inter alia, that those employment decisions were the result of intentional discrimination against her on the basis of race. See generally Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Findings with regard to the existence of discriminatory intent are findings of fact, Pullman-Standard v. Swint, 456 U.S. 273, 287-90 (1982), as are findings of discrimination, Anderson v. Bessemer City, 470 U.S. 564, 573 (1985), and causation, see, e.g., Wellner v. Minnesota State Junior College Board, 487 F.2d 153, 156 (8th Cir. 1973), and such findings may not be set aside unless they are clearly erroneous, see, e.g., Anderson v. Bessemer City, 470 U.S. at 573; Pullman-Standard v. Swint, 456 U.S. at 290; Fed. R. Civ. P. 52(a).

Assessments of the credibility of witnesses are peculiarly within the province of the trier of fact and are entitled to considerable deference. See, e.g., Anderson v. Bessemer City, 470 U.S. at 573-75. "[W]hen a trial judge's finding is based on his decision to credit the testimony of one

of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Anderson v. Bessemer City, 470 U.S. at 575. And "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. at 574; see United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

The fact that there may have been evidence to support an inference contrary to that drawn by the trier of fact does not mean that the findings were clearly erroneous. See, e.g., Healey v. Chelsea Resources, Ltd., 947 F.2d 611, 618 (2d Cir. 1991). The weight of the evidence is an argument to be made to the factfinder at trial, not a ground for reversal on appeal. See, e.g., Schwartz v. Capital Liquidators, Inc., 984 F.2d 53, 54 (2d Cir. 1993) (per curiam); United States v. Roman, 870 F.2d 65, 71 (2d Cir.), cert. denied, 490 U.S. 1109 (1989).

In the present case, contrary to Joseph's contention, the district court made detailed findings as to the reasons for the denial of tenure to Joseph as principal of PS 27, and it amply supported its findings with citations to testimony it credited and to documents introduced into evidence. Announcing its findings of fact from the bench, the trial court discussed the evidence as to each of the four years in Joseph's probationary period.

As to the first year, 1987-1988, the court found that Joseph "was sent several letters about problems at PS 27 and

deficiencies in her supervisory performance," including a March 31, 1988 letter expressing concerns relayed by PTA members as to, inter alia, "discipline at lunchtime, particularly in the school yard"; "children in the hallways of the school, in the bathrooms of the school and the lack of a standard procedure for dealing with students whose teachers are absent, for whom there is no substitute teacher"; and "dismissal procedures, disruptive use of the public address system during the school day and the need for a uniform discipline code as well as the inappropriate use of a paraprofessional." (Trial Transcript, January 29, 1998 ("Tr."), 515-16.) The court noted that "Casey made seven specific requests of Ms. Joseph to address these problems" (Tr. 516), and it found that

> [d]uring the 1987 to '88 school year, plaintiff's supervisory performance was deficient. She was informed of these deficiencies in a letter from Casey dated June 20th, 1988. It's Defendant's Exhibit 7. She failed to develop and disseminate and implement a school-wide discipline code. She continued the inappropriate assignment of a paraprofessional despite several requests for her to cease that practice and only ceased that practice upon being ordered to do so. She failed to develop and implement a standard procedure for assigning children during the

absence of teachers.

She had poor relations with parents, particularly the Executive Board of the PTA. She failed to develop a program to improve reading ability as indicated by standardized test results.

. . . .

Ms. Joseph had other documented deficiencies and performance as well. She failed to submit timely requests for funding for federal and state programs. Throughout the trial there were references to Chapter One program and the PCEN program. Those are federal and state respectively funded programs for which Ms. Joseph failed to submit timely requests as required. She also failed to conduct and report on pupil vision and hearing screening. Many of the deficiencies for which Ms. Joseph was cited are deficiencies that did not exist in other schools in the district.

In his letter of June 20th, 1988, Casey noted his concern that student reading scores had fallen. He indicated that in the previous year 41.2 percent of the students who were tested performed the 50th national percentile or higher. However, for the '87-'88 school year, the first of Ms. Joseph's service as

> principal, the preliminary review of the test results indicated that only 33.3 percent of the students tested performed at or above the 50th national percentile.

(Tr. 518-19.) These criticisms resulted in Casey's giving Joseph a rating of "doubtful." (Tr. 520.) Joseph appealed; the rating was affirmed by the Chancellor.

As to the second probationary year, 1988-1989, the court found that Joseph "continued to exhibit deficiencies in her supervisory performance" (Tr. 520), necessitating the placement of additional letters of criticism in her file for inadequacies that included the following:

> Failure to timely submit her response to the special education monitor's documentation report of June 20th, 1988. . . . [Citing Defendant's Exhibit 11.]
>
> She also failed to timely submit the school's mainstream plan. . . . [Citing Defendant's Exhibit 13.]
>
> She failed to timely submit a copy of her annual performance objectives for the '88-'89 school year . . . [citing Defendant's Exhibit 18].
>
> She failed to submit vision and hearing

screening reports for the '87 to '88 and '88 [to] '89 school year . . . [citing Defendant's Exhibits 19 and 29].

She failed to timely submit the principal's rating report of custodial services . . . [citing Defendant's Exhibits 14, 17, 21, and 29].

She submitted an unsatisfactory and not acceptable CSIP plan . . . [citing Defendant's Exhibits 25 and 27].

She submitted a grossly inadequate safety plan that was deficient in all seven categories except for establishing a chain of command . . . [citing Defendant's Exhibit 28].

She failed to meet the requirements of the Chancellor and Commissioner of Education with respect to teacher observation reports . . . [citing Defendant's Exhibit 31].

She exhibited a lack of administrative support for a very important health program, . . . and also exhibited problems collecting daily attendance data for [an] anti-truancy

project.

> She continued her failure to meet expectations in reading proficiency and the increased number of student suspensions, despite the presence of a dean, a guidance counselor and full-time pull-out teacher, further reflected badly on the discipline problem in the school.
>
> In some respects, for example, with regard to performance objectives and the hearing reports and the rating of custodial services, Casey did not have to write to any other principal in the district regarding failure to perform those administrative duties.

(Tr. 520-22.)

The court also noted that Joseph had failed to participate properly in the hiring of an assistant principal for PS 27. School principals were expected to be involved in the initial screening and candidate-development process. However, when Casey contacted Joseph "to determine if there were any candidates she wanted added to the list for the initial screening[, h]e learned that she wasn't familiar with the list of applicants and hadn't discussed the issue with the PTA." (Tr. 524.) Further criticism of Joseph with respect to the selection of an assistant principal was lodged with Casey by the United

Federation of Teachers. The union complained that, despite objections, Joseph had inappropriately permitted material endorsing one candidacy to be circulated by teachers during the school day.

In addition, the court referred to an incident that led to further criticism of Joseph by Casey. At a public community school board meeting, a PS 27 teacher read a letter from the Comprehensive School Improvement Program ("CSIP") Committee accusing Casey and District 15 of giving PS 27 inadequate support. Joseph, a CSIP Committee member, had not participated in the writing of the letter; but when the letter was read at the meeting, she sat mute. Casey viewed her conduct as unprofessional because it tacitly endorsed the criticisms despite the fact that, in Casey's view, they should have been rebutted by citing examples of District 15's efforts. The district court found that, regardless of whether Casey was correct as a matter of substance, this incident epitomized "a serious administrative deficiency that the evidence overwhelmingly established to be present at PS 27, to be present in Ms. Joseph":

> [I]f she or the people at PS 27 in fact perceived inadequacies on the part of District 15 in dealing with PS 27 and its needs, it was her job to deal with the district and to address those inadequacies to her supervisor, the superintendent. She didn't do that. None of the complaints in the CSIP letter that was read

> in that public meeting had been brought to the attention of the superintendent. Her inability to deal within the administrative process established by the Board of Education reflected significantly and adversely on her ability to be an administrator within PS 27.

(Tr. 525-26.)

The court noted that Joseph received a negative evaluation for the year, in a report that set forth the reasons as follows:

> Reason number 1, failure to provide for the safety and welfare of children as evidenced by your lack of attention and/or adherence in a timely fashion to chancellor's regulations and district requirements to the following areas; school safety plan, discipline code/plan, pupil vision and hearing screening.
>
> Reason number 2, failure to plan for instructional and school programs by lack of your attention, compliance to district and central board requirements for the following areas. Chapter 1/PCEN programs, special education monitor's report, school mainstream plan.
>
> Reason number 3, failure to achieve

> effectiveness in . . . administrative functioning of school as evidenced by your lack of attention and support and/or adherence to district requirements for the following areas [health service and attendance improvement programs].
>
> Reason number 4, failure to meet required professional and supervisory responsibilities as evidenced by your disregard for required observation reports, custodial ratings, timely submission of annual performance objectives, submission of an acceptable CSIP plan.
>
> Reason number 5, failure to provide professional leadership as evidenced by your inappropriate role during the assistant principal selection process and CSIP Committee process.

(Tr. 526-27.) The court stated, "I find those reasons set forth in this . . . pedagogical supervisory personnel report were both the actual beliefs of the superintendent and that they were held in good faith." (Tr. 527.)

As to Joseph's third year of probation, 1989-1990, the court found that the "administrative function of PS 27 showed some improvement," but that this was "due, in significant

part, to the appointment of the assistant principal." (Tr. 527.) At the end of the third year, the parties agreed that Joseph's probation would be extended for one year.

In the fourth year, 1990-1991, however, the court found that Joseph again had exhibited administrative deficiencies:

> During the 1990 to '91 school year, Ms. Joseph's administrative and supervisory performance continued to exhibit deficiencies resulting in additional letters being placed in her file. For example, the annual school inventory report was not timely filed. By February of '91 she had filed only six professional performance reviews and by June 21st of '91, she had filed only 27, failing to meet the requirements.
>
> The safety plan was found to be deficient in three of seven categories. There were violations in the lunch program performance standards. The Lutheran Medical Center had discontinued its health program because she failed adequately to support it. In his letter of June 18th, 1991, which is Defendant's Exhibit 50, Casey summarized Ms. Joseph's continued difficulty in achieving effectiveness in administrative

> functioning, in the administrative functioning of PS 27.
>
> . . . .
>
> During the time Ms. Joseph was principal of PS 27, it was the lowest performing school in the district in both reading and math. During that period of the approximately 620 elementary schools in the city, PS 27 ranked between 600 and 610.

(Tr. 529-30.) Casey thus rated Joseph as unsatisfactory, giving as his reasons

> her failure to adequately address continued poor pupil achievement, particularly in the areas of reading and mathematics, failure to achieve effectiveness in the administrative functioning of the school and in responses to district and central board requests; failure to address pupil and community needs as evidenced by a lack of support for a school-based health service program and a failure to achieve the minimum standard of pupil attendance.

(Tr. 531.)

After reviewing the pertinent legal principles as to the shifting burdens of production in a Title VII case, the court concluded as follows:

> Although the McDonnell Douglas test shifts the burden of production to the defendant, the ultimate burden of persuading the tr[i]er of fact, in this case me, that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. The question becomes whether the plaintiff has shown by a preponderance of the evidence that the defendant is liable for the alleged discriminatory conduct. Here, I've been provided with ample and in my respectful judgment, overwhelming evidence of a nondiscriminatory reason for the denial of tenure to Ms. Joseph. In fact, there are a number of reasons that have been presented to me. The overarching description of those is a failure on her part to adequately preside as an administrator over PS 27. . . .

(Tr. 541.)

We see no error in the district court's application of the legal principles; nor do we see any clear error in the court's thorough findings of fact.

Joseph does not argue that any of the above findings are clearly erroneous; rather she contends that the district court did not properly take into account her evidence and arguments, such as (a) evidence that Casey based his decision to deny Joseph tenure in part on a flawed analysis of PS 27

test scores, (b) the argument that Joseph's failure as PS 27 principal was virtually guaranteed by the lack of support given that school by District 15, (c) Joseph's testimony that Casey had made or tolerated racially discriminatory remarks, and (d) the contention that racial discrimination should be inferred from the fact that a white principal in District 15, Ms. Goodman, whose school also had low math and reading scores, was not denied tenure. The record, however, belies any notion that the court failed to consider these matters. For example, the court addressed the flawed test-score analysis and found that Casey was shortly furnished a more accurate analysis and that, given the breadth of the information on which his tenure decision was based, his decision would not have been different had he had the more accurate analysis earlier:

> I credit the testimony of Mr. Casey that he relied on a wide variety of factors in making his adverse employment decision with regard to the plaintiff.
>
> He considered her performance over the entire four year probationary period and the achievement skills in reading and math over that entire period. He considered her ability to do the job as principal, to perform the administrative function required of a principal.

(Tr. 533.) As to the suggestion that District 15 denied PS 27 support, the court found, for example, that

> District 15 provided ample support to PS 27 during the '87 to '88 school year. It was one of four schools in the district that received funds for Project Child, one of about a half dozen schools in the district that received funds under the Right to Read Program, one of two schools in the district that received funds for after-school and tutorial programs, the only elementary school in the district that was given a guidance dean position.

(Tr. 520.)

As to Joseph's testimony that Casey had made or tolerated racially offensive remarks, such as that "Joseph, of all people, ought to be able to get along with the parents of the PS 27 students" (Tr. 536), the court stated, "I cannot find in the context of the entire case that these statements either independently or in the aggregate evidence a racial animus" (id.). The court also noted that

> [d]uring Casey's tenure as Superintendent of District 15, the district actively recruited minority supervisors . . . referring to principals and assistant principals. These efforts bore fruit. During that period the percentage of minority supervisors in the district doubled from 20 percent to 40 percent.

> During Casey's 10 years as superintendent, he gave unsatisfactory ratings to only three principals. One of them, of course, was Ms. Joseph. The other two were white . . . supervisors.

(Tr. 535.) As to Joseph's contention that racial discrimination should have been inferred from the failure to deny tenure to Goodman, the court was unpersuaded:

> There has been some evidence presented to me of test results in Ms. Goodman's school but I'm persuaded that the evaluation of administrators in the public schools within District 15 was based on a far broader array of factors; that there were many parameters in the evaluation process and I'm not persuaded that before me are two similarly performing principals; that is, Ms. Goodman and Ms. Joseph. So . . . I ascribe no weight to the fact that Ms. Goodman was not denied tenure or that her file does not reflect lesser forms of administrative sanction.

(Tr. 539.) We reject Joseph's contention that, because the Board of Education failed to produce a more extensive personnel file on Goodman, the district court's evaluation of the evidence as to Goodman was impermissible. Prior to trial, the Board represented to the court that it had searched for all evaluations of District 15 principals for the period 1987

through 1991 and that it had produced all it could find. At trial, the Board produced Goodman's file for the court's review in camera. It was well within the discretion of the court to conclude that the Board had proceeded in good faith and to reject Joseph's contention that the sparseness of Goodman's file compelled an inference that Goodman was favored, and Joseph disfavored, on the basis of race.

In sum, the weight to be accorded the evidence, like the evaluation of the credibility of the witnesses, lay solely within the province of the district court as trier of fact. We have seen nothing in the record to suggest that the court's findings were clearly erroneous.

CONCLUSION

We have considered all of Joseph's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 15th day of March, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Amalya L. Kearse
Circuit Judge
Hon. Milton Pollack*
Hon. Richard Conway Casey**
District Judges***

---

*The Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

**The Honorable Richard Conway Casey, of the United States District Court for the Southern District of New York, sitting by designation.

***Pursuant to 28 U.S.C. § 46(b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by an emergency panel consisting of one judge from this Court and two judges of the United States District Court sitting by designation.

Docket No. 98-7246

DOROTHY JOSEPH,

Plaintiff-Appellant,

-v-

NEW YORK CITY BOARD OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgement of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
Carolyn Clark Campbell, Clerk
By:
/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

/s/date stamped March 16, 1999 by Carolyn Clark Campbell, Clerk of the United States Court of Appeals Second Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOROTHY JOSEPH

IN -vs-

BOARD OF EDUCATION

JUDGMENT
A CIVIL CASE

CV-94-3025
J O H N
GLEESON,
U.S.D.J.

_____ JURY VERDICT. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

__XX__ DECISION BY COURT. This action came to trial or hearing before the Court with the Judge named above presiding. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of the defendant and against the plaintiff..

ROBERT C. HEINEMANN
Clerk of the Court

February 2, 1998

/s/ Vivina Virno Klein
Vivian Virno Klein
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOROTHY JOSEPH -vs- BOARD OF EDUCATION	CV-94-3025 United States Courthouse Booklyn, New York January 29, 1998 2:00 o'clock p.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRCIT JUDGE

APPERANCES:

For the Plaintiff: RICHARD NAGER, ESQ.

For the Defendant: BARBARA B. BUTLER, ACC.
STEVEN WEISS, ACC.

Court Reporter: Sheldon Silverman
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 254-7214

Proceedings recorded by mechanical stenography, transcript produced by CAT.

Transcript beginning pg. 483

THE CLERK: Civil bench trial, Joseph versus New York City Board of Education.

THE COURT: Good afternoon. Nice to see you. Mr. Nager?

MR. NAGER: So my client can hear, might she sit upfront?

THE COURT: Of course. Anyone who want can come up. You can all do that, anyone who wants can come up. There's no jury here.

MR. NAGER: Good afternoon, your Honor. May it please the court, Ms. Butler, your Honor:

Plaintiff has proven by a preponderance of the evidence that William P. Casey, Superintendent of District 15 while acting in his official capacity as an employee of the Board of Education intentionally denied tenure to plaintiff, did this because of her race.

The record has shown Dorothy Joseph was impeccably qualified to be principal of PS 27, had a commendation in 1996 from Howard Golden, Brooklyn Borough President, for her work as an educator, success as an educator, came to a difficult school and set out to work.

By Superintendent Casey's own admission, the

mission of a principal is to be an educational leader, an instructional leader. I believe the record indicates and shows Ms. Joseph was more than an instructional leader. She brought reading and math scores up in the school not only the fourth year -- the court heard testimony from Dr. Canner concerning a substantial increase in reading and math scores the fourth year, but Dr. Canner also testified and it's in the record about the increase of reading and math scores the second year that Ms. Joseph was there.

Ms. Joseph never got praise for any of her significant accomplishments. I think what happened was there was an illusive and shifting standard, so that by the third year Ms. Joseph was rated satisfactory. She had finally gotten an assistant principal, was rated satisfactory.

There was then a letter which was Exhibit number 5, also separately listed as a separate exhibit, but from June 27th, 1990 which stated to Ms. Joseph there was a serious problem with reading and math scores, that Superintendent Casey wanted her to improve reading and math scores; that should she not do this, she might be denied a certificate of completion of probation. Ms. Joseph worked hard as she always did, set out to improve reading and math scores which she had done by opening the library her first year and continued through her four years to work on pupil achievement.

Dr. Canner credibly testified she improved reading and math scores, yet not only wasn't she given credit for that

but the scores which Superintendent Casey presented to her at her evaluation conference indicated a serious decline in reading and math scores. I think, again, Ms. Joseph, whatever she did, the record indicates she could do no good.

I believe the record also indicates and shows credibly by a preponderance of the evidence that this was due to racial bias. There were two racial remarks that are probative and a racial incident.

First, there was the graduation ceremony. Ms. Joseph and Superintendent Casey were discussing the graduation ceremony concerning the graduation of sixth grade students and Superintendent Casey said to Ms. Joseph, "This would probably be the only graduation most of these students would have." Ms. Joseph received this, experienced this as a racial remark, I believe, indicative of Superintendent Casey's attitude towards minority children, reflective of the way he treated a good educator who also in his eyes always failed. He could see no promise for the children of that school and he could see no promise for Dorothy Joseph who was objectively, as the record shows, improving the conditions in that school.

There was then a second incident that had to do with the PTA. The record shows PTA executive board, the parents, there were some difficulties with the parents in the community. These predated Dorothy Joseph's service at PS 27. Superintendent Casey said to Dorothy Joseph, the record shows many of these parents were irate, approached

Superintendent Casey in an irate manner. He indicated to Dorothy Joseph at one point "You, of all people, can deal with them." I believe that's a stereotype, a generalization that's indicative of racial bias because there's no other interpretation that he was talking about people of color, addressing people of color. It was inappropriate and I believe it also reflects racial bias.

The third incident is with regard to Lutheran Medical Center. Your Honor, you heard a lot of testimony about the Lutheran Medical Center. This was a hospital school-based program that was placed at PS 27. Ms. Joseph worked arduously to get the parents to cooperate. There was a problem, for example, if there was an emergency, the hospital was on the premises of the school but if there needed to be follow-up care, needed to be an emergency and parents had to travel to the hospital, it was a two-fare zone. A lot of parents had trouble with traveling to Lutheran Medical Hospital. They were economically people of modest means; it was difficult. Ms. Joseph worked to get them to sign consent forms but she had difficulties.

In addition, Ms. Joseph communicated to Superintendent Casey, Nurse Parker made a racial remark concerning the children there, actually concerning the parents. She talked about the parents not having any phones. She showed contempt, bias toward the people in the community.

There's also a letter in the record, Plaintiff's Exhibit 61, I believe. I would have to check the number, your Honor.

There's a letter from Kathy Powell to Norman Fruchter, the President of the Board of Education. Superintendent Casey testified that it was cc'd to him, had notice of this problem. He admitted he didn't investigate it. Again, it shows insensitivity to race, bias, contempt for parents in the community, children in the community and ultimately for Ms. Joseph.

If we look at the history of what happened here, your Honor, there are also procedural irregularities that were brought out by Stan Kanter who credibly testified as the contract which was admitted into evidence between the principals and the Board of Education requires when there's an end-of-the-year conference, that the principal who's being rated should get 48 hour notice in order to prepare for that conference, perhaps bring a representative. Ms. Joseph testified she never got notice, this 48-hour notice.

Superintendent Casey didn't deny that. Particularly what he did say is that the contract said something else. He said 48-hour notice is required when there's a certain kind of misconduct that's involved, certain charges are going to be brought. Actually, he was talking about a later contract. That was cleared up by Stan Kantor in his testimony. The contract in effect at that time indicated the 48-hour notice must be followed and Superintendent Casey did not follow it, procedural irregularities, circumstantial evidence, inferences that Dorothy Joseph was subject to a special scrutiny continually over and over again, your Honor.

THE COURT: Where's the evidence that that was special?

Did everyone else in connection with their year-end evaluation get a 48-hour notice if they were going to get an unsatisfactory or doubtful review?

I have testimony from the superintendent that says discipline is discipline; evaluation is evaluation. If you're going to discipline someone, give them 48-hour notice. This wasn't discipline. This is a pedagogical evaluation.

Did other people -- there's testimony there were two other supervisors that got unsatisfactory evaluations during the tenure of Mr. Casey.

Did they get 48-hour notice?

Did they get preferential treatment?

MR. NAGER: Ms. Joseph testified she believed it was followed. I don't believe there's evidence in the record concerning whether they got that particular treatment but Ms. Joseph --

THE COURT: What's the authority, by the way, that you're relying on? It's apparently not factual.

What's your legal authority for the notion these year-end evaluations, if they're not favorable, if they're unsatisfactory, equal discipline for the purpose of that notice provision? If I recall correctly, the notice provision in that contract refers to discipline.

MR. NAGER: Right.

THE COURT: Why is evaluation at the end of the

year equal to discipline?

MR. NAGER: I would make a more factual argument, particularly with regard to the denial of tenure. The last evaluation in 1991, if Ms. Joseph were not to meet the requirements or if the conference were not to go in her favor, she would lose her principalship. She would be denied tenure. I can't think of anything of greater consequence than that event. I think a reasonable interpretation of the contract which is in evidence, was in effect at the time, is that it would certainly, at the very least, apply to the fourth year conference.

THE COURT: What good does that do you if I credit the superintendent's testimony that that was not his interpretation?

You're relying on this alleged procedural irregularity as evidence of racial animus. This isn't a case about procedural due process. If he, in fact, believed it wasn't necessary to give 48-hour notice, what good does it do your case even if you're right that notice is required before a conference in which someone is denied tenure?

MR. NAGER: I think it's a matter of context, your Honor. The record shows repeated episodes where Superintendent Casey treated Ms. Joseph differently.

For example, with regard to Melissa Goodman, there's testimony from Dr. Canner Melissa Goodman's school, PS 38, similarly situated principal that was white, the scores in her school declined in the years '89 to '91, whereas we have Court

Exhibit number 1, the file of Ms. Goodman, there's not one memo in there concerning test scores.

Why is it that Dorothy Joseph was taken to task for test scores whereas Melissa Goodman wasn't? I believe the record shows that's disparate treatment.

With regard to the third year, again, I believe the record shows by the third year Ms. Joseph was rated satisfactory; that the superintendent established an objective standard and then when she met the standard, based upon the credible testimony of Dr. Canner she met the standard, Superintendent Casey again came up with other reasons. One of the reasons had to do with the Lutheran Medical Center which has racial bias aspects to it I just discussed.

In the first year Dorothy Joseph opened up the library. Children learn to read by going to the library, reading books. There was no mention of that. The defendant put in its exhibits the evaluations from the first year. There's no praise for opening up the library.

In the second year Dorothy Joseph -- after the first year Dorothy Joseph is told to raise reading and math scores. After the second year she raised reading and math scores. In her second-year evaluation, she's rated unsatisfactory. There's no praise for her achievement. All of this in the context of disparate treatment with regard to Melissa Goodman an racial remarks, I believe, suggest a very strong inference of racial bias on the part of Superintendent Casey.

In addition, there was testimony about clandestine

meetings by Kathy Rasso during the first year at PS 27. There was continual attempts to undermine Ms. Joseph's authority. I think that's also a piece of circumstantial evidence that indicates Dorothy Joseph is being treated differently.

There's a letter in evidence that Dorothy Joseph wrote in her fourth year to Superintendent Casey where she complained about Saunders, her assistant principal not doing certain things. The record shows Saunders was Superintendent Casey's choice and the PTA and Dorothy Joseph wanted Ann Hubbard, the only black guidance counselor in the district, to be appointed assistant principal. Dorothy Joseph continued, as she testified, she wrote letters; that she called Casey to respond to memos, to respond to problems but he never got back to her. He just cranked out memo after memo as though he were deliberately trying to create a record to undermine her. I think that's what was done here. I think she was the second black principal in District 15. She was breaking the color barrier. She was becoming part of management.

We know about segregated schools; that this was a segregated school, very few whites in this school. However, there was the Brooklyn New School, mostly white, and PS 27 which shared the same building. Ms. Joseph was sensitive to race relations. She wanted the two schools to communicate. She mentioned that to Casey, testified about that. He never got back to her.

There was an art teacher she had. There was testimony that Casey needed more space for Brooklyn New School. One of Ms. Joseph's art teachers had to wander the halls in PS 27. I think that's an aspect of Superintendent Casey's attitude towards race as well. I think all these fit into a puzzle which show an attitude towards race, particularly towards Ms. Joseph because she was a person of color who was successfully and dynamically raising the standards of this school and objectively did so.

Another point, your Honor, is that I know the defendants will talk about their memorandums. When you evaluate the memorandums, the memos that were produced into evidence by the defendants. One should take note a lot of them are issued on the same day and they're issued at the end of the year, again five or six memos. Ms. Joseph, another procedural irregularity, never given notice of certain things.

Suddenly at the end of the year, five or six memos are given to her at the conference without representation, without notice. This, I believe the record shows, this is a cover-up, a setup. Along with the segregated conditions out there between Brooklyn New School and PS 27, the racial remarks, the racial bias, undermining of authority, the failure to recognize positive achievements, that's not so subtle intentional discrimination. That's intentional discrimination in undermining the first black principal of that school and the second black principal of District 15.

Ms. Joseph inherited a school that had tremendous

problems. Superintendent Casey admitted that. It had a decade of very poor, low test scores. Some of the testimony from Superintendent Casey involves a kind of word game. The indication is well, even in PS 27 scores went up, they're still poor. If that's not undermining achievement, if you improve, you could always compare that improvement to something else, find it poor, but this was a school that was coming a long way. For it to improve four percentage points in the last year, say there are still schools on the upper East Side or schools in Park Slope or wherever that are ranked higher, that shows insensitivity to what's going on as well; the sociological facts, the historical facts of this school.

You heard a lot of testimony about plagiarizing a plan, a discipline plan for the school, discipline code. Yet, Kathy Rasso testified the CSIP did improve that plan, added intergraphics into that plan. It was common practice for schools to share plans, but Ms. Joseph was accused of plagiarizing, of stealing. Very suspect, your Honor.

Eventually the codes -- actually, there being testimony from Ms. Rasso, the code became uniform. Now there's one uniform code for all the schools.

There's a letter from defendants in evidence concerning a letter that was read at a CSIP committee meeting, a Board meeting and supposedly Ms. Joseph instigated, based upon no evidence at all, based upon air, nothing. Superintendent Casey accused her of supporting insurrection. Sharon Leidlein testified that was not so; she

had nothing to do with it.

THE COURT: I thought he testified at the meeting he thought she had something to do with it, but she disabused him of that notion after the meeting and his problem with her was her failure to stand up at the meeting and correct assertions about lack of support that he thought she ought to correct.

Wasn't that the nature of his accusation?

MR. NAGER: I'm not clear that that's what it was. My understanding was that what standard is there that he expects her to stand up at a meeting?

What does that have to do with principal qualifications that she should stand up at a meeting and say X, Y or Z?

The record shows he went right back to his office. He wrote a letter to her.

THE COURT: My question to you was just far more narrower than that. My understanding was that he didn't accuse her of writing the letter or instigating an insurrection, but rather his problem with her, his problem with superintendent to principal was after this public airing of allegations he hadn't heard before, that she didn't do something to correct these allegations of nonsupport.

That's what I thought -

MR. NAGER: Even for argument sake he said that -

THE COURT: Let's not say for argument sake. We have a record now. This is a summation.

MR. NAGER: Right. I don't have total recall of the

record.

My best recall -

THE COURT: Try not to represent things as true that you don't recall from the record because we're at a point now what's in the record matters. Go ahead.

MR. NAGER: I apologize.

I would like to bring out some other contradictions I understand are in the record. There was a constant criticism Ms. Joseph or criticism by Superintendent Casey Ms. Joseph be concerned about safety in the school. Then in two instances, one where, apparently, she had been suspending children, she got a memo for too many suspensions.

In another instance, there was a graduation party that some parents wanted to have at night. She was concerned about the safety of the children and I believe Superintendent Casey took her to task for that position.

THE COURT: What's inconsistent about being chastised for too many suspensions and being chastised for inadequate safety procedures.

Isn't one evidence of the other?

MR. NAGER: I believe suspending -- there was testimony concerning the violence or the crime in the surrounding neighborhood and some of the difficulty in disciplining these students. I believe a suspension would be a way of managing children who are acting out, who would be protecting the children who aren't acting out from those who are causing havoc.

THE COURT: I suppose that's one way to deal with the lack of discipline is to punish it, but isn't the defendants' position a different one; that the events that gave rise to this, more than one hundred principal suspensions, ought to have been prevented by having some discipline code in place so that the problems in the school can be dealt with before they happen rather than by punishing the students by suspension after they happen?

Wouldn't that be a way of rendering consistent the complaints with the suspensions and the complaints about the discipline code?

MR. NAGER: The code itself, yes. I believe Dorothy Joseph credibly testified that she came to the school, there was havoc, no code and that she was working with the CSIP Committee to make this code and Kathy Rasso testified they were working arduously and Superintendent Casey wanted to know what they were doing. He could have attended the meetings which he didn't do, didn't seem to ever give them any credit for what they were doing; that there was a code that was eventually done and that --

THE COURT: Isn't it undisputed, though, there was a failure to forward to the district office a disciplinary code?

Is your response to that if the superintendent wants to know what it is or why there isn't one, he has to go to the CSIP meetings in each school?

How does the superintendent do that?

There's 26 schools. I don't understand that argument.

He is not supposed to hold the principal accountable for the failure to come up with a plan because he didn't go to the meetings that didn't bear any fruit and appreciate how hard it was to come up with a plan?

Is that what you're arguing?

MR. NAGER: No, my argument is in a normal situation where there wasn't racial bias, the kinds of facts that came out in the record; that there would be a dialogue; that there would be a response; that if you believe, if the court believes Ms. Joseph as she testified, tried to reach Mr. Casey, respond to these problems, called him, wrote letters and that there's nothing in her file concerning her efforts -

THE COURT: Where are the letters that write back and say bear with me, I'm having trouble with the CSIP meeting? That's why I haven't responded to your repeated requests for a disciplinary code or for a plan what to do with students when teachers are absent and there's no substitute or for why there's a paraprofessional guarding the door? Where are these letters?

MR. NAGER: There is Exhibit 61 -- Exhibit 10 which is the letter that Dorothy Joseph wrote to Saunders -

THE COURT: This is in June of 1991. These are problems that are documented from the district office beginning halfway through her first year.

You mentioned there's correspondence coming from Ms. Joseph back to the superintendent explaining these difficulties. Where is it?

MR. NAGER: Ms. Joseph testified about it. The letters are not in the record. She testified about them, testified about phone calls -

THE COURT: Where is that in the record? I don't mean to make you scour it now. You'll have a break. I would like you to invite my attention to that portion of the record. You'll have a break to look for it. Please go ahead. I'm sorry to interrupt you.

MR. NAGER: In conclusion, I would like to say the preponderance of the evidence shows a pattern of undermining the authority of Ms. Joseph, never giving her credit for anything positive, relying on false statistics which I believe Superintendent Casey knew or should have known were inaccurate.

Dr. Canner spent a great deal of time explaining in Exhibit 5 how the apples-to-oranges comparison works. I believe the evidence suggests a reasonable inference from that that someone moved statistics around. She described it as having a state standard and a city standard which is also the national standard. By using one standard in '89-'90 year, you make the standards, the scores higher. By using another standard you make the scores lower, throw out this second grade. Suddenly you get a lowering score, whereas when Dr. Canner, who by the way, testified that she was working for the Board of Education even in May and June of 197, she was in charge of these kinds of testings, statistics. When it's done correctly, the scores went up.

You hear also about disaggregation which sounds mystifying. The Brooklyn New School, it means was a higher achieving school and PS was a lower achieving. When you disaggregate it, the scores went up. They were lower, at a lower level but the scores still went up.

THE COURT: What is your factual assertion here; that there was a conspiracy between Mr. Casey and Josephine Urso to cook these preliminary results from the state tests, cook them and deliberately set up an apples-and-oranges-type thing in order to come up with a pretext for firing Ms. Joseph? Is that what you're asserting?

MR. NAGER: No. What I'm asserting -- I don't know that there was a conspiracy because there's no evidence of a conspiracy.

I'm asserting -

THE COURT: They're prepared by Josephine Urso.

MR. NAGER: Superintendent Casey was a principal for 10 years before becoming superintendent. I believe there was testimony concerning that; that he had experience looking at statistics as did this who caught this error and a superintendent has a great concern, particularly when you're denying tenure to look at statistics. I believe Dr. Canner credibly testified this jumps out at you. In fact, with regard to the reading scores, she said she's never seen that before in her career.

THE COURT: So he -- this is your theory -- he's got racial animus, looking for some reason to deny tenure to Ms.

Joseph. He asks Ms. Urso to work on the preliminary results, do a study and Ms. Urso on her own, innocently, comes up with an erroneous set of conclusions and then he goes "A ha, this is my lucky day, here are some erroneous conclusions. I'm looking for a reason to fire Ms. Joseph. Here it is, " that's what it boils down to?

MR. NAGER: Not necessarily. A reasonable inference could be there may have been some communication between Urso. She was working for Superintendent Casey. Whoever moved it around, there's no actual testimony but the point is that he relied on those statistics and that he knew or should have known there was an outrageous error and it was exactly on the point that he was evaluating her pursuant to the June 27th, 1990 letter. Yes, I believe this was a setup based upon the record, the credible record.

Finally, your Honor, the damages suffered by Ms. Joseph as testified by Ms. Joseph, the testimony presented by Ms. Joseph, is the back pay that she would have received from 1991 to 1997. Exhibit 1000 sets out the schedules for salaries and reasonable projected pay into the future. I believe she presented herself as a vital and articulate woman, would be working at PS 27 today were her career not cut down by this intentional discrimination.

Thank you.

THE COURT: Thank you, Mr. Nager.

MS. BUTLER: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. BUTLER: Mr. Nager, good afternoon.

As I argued in the opening statement, this case is not about Ms. Joseph's character. It's not about how hard she worked. It's not about various specific things she did during the course of her four years at PS 27. What the case is about is whether or not when she didn't get tenure, the reason she didn't get tenure was because she was an African American. It's defendants' position there is a real dearth of evidence with respect to any such discrimination.

What has the plaintiff looked at? Well, Mr. Nager argues to what is allegedly overt discrimination, a variety of comments; one concerning a graduation exercise, another concerning interrelationships with the members of the PTA. It's defendants' position on their face there's nothing discriminatory about those particular comments.

Also, there's been testimony with respect to the graduation event; that that was what the parents wanted and that the superintendent decided that that was an appropriate thing, given the parents' desires.

With respect to the comment about "You, of all people, should be able to work with the PTA, 11 well, Ms. Joseph wasn't sure that was the exact language, but let's say it was. Who of all people but the principal of the school should be able to communicate and work with the parents concerning their issues that they have concerning safety, concerning discipline? There's nothing at all discriminatory about that particular sort of comment.

It is definitely Mr. Casey's testimony that when he spoke to Ms. Joseph about the communications with the PTA, he was telling her that; that she needed to be able to communicate with these parents and defendant submits that's a perfectly appropriate comment and subject for conversation by the superintendent.

Then we get to the one other purportedly overt issue of instance of discrimination. That concerns the Lutheran Medical Center where it's claimed there was a report to the superintendent about alleged discrimination on the part of the people who were from that institution meeting with the parents; that he was in fact sent a letter. Well, Mr. Casey testified he didn't perceive that what was being charged in that letter was discrimination, but much more importantly, what Mr. Casey testified to was that he believed this was a very important program and that what he wanted to do was to facilitate that program's working and that's where he put his efforts in terms of trying to set up a next meeting where they might be able to work out the difference. Again, that's not evidence of discrimination. It's evidence of a superintendent doing what the superintendent's supposed to be doing.

Some of the circumstantial evidence of discrimination that plaintiff points to are things such as the failure of Mr. Casey to follow the procedures when he had conferences with respect to unsatisfactory ratings when he decided not to grant her tenure.

As your Honor pointed out, what Mr. Casey testified

to was his belief that in the contract and the contract that is in evidence does say that those procedures come into effect when disciplinary action is envisioned. He does not perceive that disciplinary action is involved in an unsatisfactory rating or in a denial of tenure. Despite the fact that a union representative believed they were, certainly Mr. Casey's belief is a reasonable one. Not only that, but again as your Honor pointed out, there's absolutely no evidence that Ms. Joseph was treated any differently than anybody else by the superintendent with respect to the invocation of this particular clause of the contract.

Next, we have a reference to clandestine meetings. I'm assuming the reference of Mr. Nager was to the meetings with the parents. We would deny they were clandestine because there is evidence, even in the writings, that the superintendent was telling the principal that he was having -

THE COURT: I think he used that term "in connection with meetings of teachers."

MS. BUTLER: If that's the case, your Honor, Mr. Casey said he really wasn't aware of any of those meetings; he didn't know about them.

THE COURT: Am I right about that, Mr. Nager?

MR. NAGER: Yes, your Honor.

MS. BUTLER: He didn't attend any informal meetings with teachers. So there isn't any evidence that would connect, assuming there were such meetings, Mr. Casey to those meetings.

There's then a reference to the failure of Mr. Casey to follow procedures with respect to the PTA's recommendations with respect to the assistant principal; that it was the principal and the PTA who wanted Ann Hubbard. Defendant would submit that Superintendent Casey's testimony concerning what the procedure was for the appointment of an assistant principal was quite believable and quite precise about the various steps that were involved -

THE COURT: What's that fellow's first name, Saunders?

MR. NAGER: Lawrence.

THE COURT: Sorry.

M.S. BUTLER: That there were three entities that got to put together a list of the applicants after people that had applied; that the PTA was one of them; that the superintendent and his of ice was another and that the community board was a third.

The next step of that process was to have all of the people on that combined list interviewed by a member -- by members of the PTA, by a tenured principal and a member of the Board. It was then they made recommendations and that last list of recommendations went to formal interviews which were conducted by the superintendent and the board at an open meeting that the parents could attend, the principal could attend and then there was an executive session. Defendant submits that's perfectly credible testimony about what the process was and what the procedure was.

Superintendent Casey does acknowledge that when he spoke to Ms. Joseph about who he wanted to recommend in executive session, his choice was different than Ms. Joseph's. He also said there were only one or two times in his time as superintendent that that occurred, but that he believed that given her history at PS 27, there was a need for somebody with administrative strengths. So, he stayed with his recommendation. I think the record amply supports there was a need for someone with administrative discretion and that there's no indication that that is a discriminatory action.

Mr. Nager also referred to the CSIP letter at the opening meeting. Again, as your Honor indicated, what concerned Mr. Casey was the fact that a principal sat there during the course of the reading of that letter and never got up and said we did get the following sorts of resources. Those resources are attached in the memos written by Mr. Casey -- excuse me, by the superintendent office staff and attached to the letter that Mr. Casey wrote.

Mr. Casey also testified in connection with that that he had to appear at his office the next morning and face his own staff who was understandably upset by that, given the memos they wrote about the various efforts that they had made. Again, there's nothing discriminatory that can be drawn from that particular incident.

Mr. Nager referred to the disciplinary code and the testimony that in fact there had been a great deal of effort that had gone into it and there wasn't plagiarization. What Mr.

Casey testified to, he got a plan that had White-out of another school. That was never denied.

Was it reasonable for him to be concerned that what he got was a plan that had another school's number whited out? Defendant submits it was more than reasonable and that it wasn't an indication the process of sitting down and working through a code, which is what Mr. Casey believed should have happened, that it didn't happen in that instance.

The last specific that Mr. Nager referred to is generally this issue concerning the scores of PS 27 and certainly plaintiff is focused on that a good deal concerning the four years. It isn't disputed there were errors in those scores for the spring of 1991. What also really isn't contested is that over a four-year period there were continuing low performing scores. There may have been a certain amount of variation, but it wasn't Mr. Casey who designated in the spring of 1991 that PS 27 was a low performing school and it was the only low performing school in the district. It wasn't Mr. Casey back in 1987 when there was the CSIP which was appointed because it was low performing. Those were other entities and whether there were errors when Ms. Urso did the compilations or not, the school maintained its low performance throughout those four years and at the end of Ms. Joseph's tenure continued to be a low performing school.

I would also note that what Mr. Casey testified about was that there was not a plan in place and that is what concerned him. He also, in that connection, and moving to

Ms. Goodman and PS 38, testified there was a plan in place in that school.

I also note with respect to PS 38 that, yes, Ms. Canner did compare the scores, but she wasn't even really able to testify they were similarly situated because she didn't look at any various and assorted factors. Again, it was Chancellor Fernandez who had to notify and did notify Superintendent Casey, not that PS 38 was a low performing school but that PS 27 was.

Also, with respect to Ms. Goodman who appears to be the only person that plaintiff is pointing to as someone who is similarly situated to herself, there's absolutely no evidence of the fact that Ms. Goodman had the difficulties in administering her school that plaintiff had in administering 27 which leads me to the final point that the defendant wants to make which is really that throughout the whole four years there was a continuing pattern and some of the specifics may have changed. In one year it may have been a school safety plan, in another year not conducting the hearing and vision screening, but in each of the three years where we have evaluations that aren't satisfactory, you have set forth in the reports, in the pedagogical reports, that there is a pattern of an inability to perform in very significant ways and there's testimony with respect to the one year that there was a satisfactory performance that Mr. Casey did not believe it was proper to give her an unsatisfactory rating because of the mentoring program.

THE COURT: I don't seem to have a copy of the 188-189 pedagogical supervisory report, Defendants' 33. Do you have a copy in the courtroom?

MS. BUTLER: I should, your Honor. I'll get that.

In that connection., really in closing, what plaintiff has absolutely failed to show is that compared to other people in the district she was treated in any discriminatory way. She was sui generis with respect to the failures to perform and it was repeated. There's no evidence that other principals had the same deficiencies who were treated differently and the record here amply supports a conclusion that she is someone who was not given tenure as a principal.

THE COURT: Thank you.

The other thing I need, there's a reference on page 9 of your proposed findings to a letter dated June 26th, 1989. It's referred to as Exhibit 26 in which Mr. Casey outlined areas of concern. It's paragraph 24 of your findings. Exhibit 26 is not that letter. If you could help me with that I would appreciate it.

MS. BUTLER: Which paragraph in the findings?

THE COURT: Paragraph 24, page 9. Defendants' 26 is actually a letter dated June 6th. It concerns an appeal. It's the letter from the board advising Ms. Joseph her appeal of the 1988 evaluation was denied. If you could find for me the exhibit in reference to 24, 1 would appreciated it, paragraph 24.

Mr. Nager, anything you would like to say in rebuttal?

MR. NAGER: Might I take a minute to check the record?

THE COURT: Yes, you may.

(Pause.)

MR. NAGER: Your Honor, with regard to a concern that you had, I remember seeing this in the record with regard to Ms. Joseph's testimony. I would just ask that when you're considering the decision, if I could have time afterwards to look for it, but I don't know that you want me to take the time now to go through it. I believe there was a reference to her saying she called Casey, wrote letters concerning her response. I want to direct your attention. I apologize, I prepared this in a short time. Most of my proposed findings do have references, in fact the paragraphs have references to the trial transcript.

I would like to say, finally, your Honor, in rebuttal that the pattern here, I use the word Gestault, or overall pattern, if I may, is that in the third year, Dorothy Joseph was rated satisfactory and then a standard was set to raise reading and math scores. She did, the record indicates credibly from Dr. Canner, she did do that. She was denied tenure.

I believe that PS 38, Melissa Goodman is a comparative. I believe there's testimony that she started approximately the same time and was given tenure the following year. Yet, Dr. Canner testified her scores were declining in the last two years. Yet, there's no memo in her file concerning scores. I believe that's a different standard.

I believe Dorothy Joseph was subjected to special scrutiny because of her race.

THE COURT: Thank you.

Is there a copy of Defendants' 33?

MR. WEISS: We're looking for it, your Honor.

MS. BUTLER: Defendant's 33 you have, your Honor (handing).

(Pause.).

THE COURT: The letter I'm interested in is the letter in which Mr. Casey informs Ms. Joseph he's rating her unsatisfactory for '88-'89.

MS. BUTLER: Defendant Exhibit 33.

THE COURT: That's 33?

MS. BUTLER: I have no idea why I did that.

THE COURT: I have two 33's.

We'll adjourn until 4:00 o'clock when I'll give you my findings of fact an conclusions of law orally.

(Recess.)

THE COURT: Please come up as close as you like. I'll state orally my findings and conclusions. You don't need to stand at the lectern. I just wanted to invite everyone who wants to hear to one of these chairs up close. This is an action brought under Title VII of the Civil Rights Act of 1964 as amended, 42 United States Code Section 2000(e) and following. The plaintiff, Dorothy Joseph, claims that she was denied tenure as a principal in PS 27 in Brooklyn on account of her race. Ms. Joseph is an African American. I have

jurisdiction under Honor 28 U.S.C. Section 1331. The complaint in this case was filed in September of 1994.

Prior to trial the Board of Education, which is the defendant, moved to strike the plaintiff's jury demand on the ground her cause of action arose on June 21st, 1991 when she was denied tenure, a date that's before the effective date of the Civil Rights Act of 1991 which conferred a right to jury trial on Title VII plaintiffs. For reasons set forth in a memorandum and order dated February 3rd of last year, 1997, 1 granted that motion. As a result, we had a bench trial on January 21st and 22nd of this year. I heard closing arguments this afternoon and the following constitutes my findings of fact an conclusions of law.

My findings of fact are as follows. Dorothy Joseph, the plaintiff, was born in Brooklyn, educated in the New York City public schools. She has degrees in education from the New York University School of Education and from the Teachers College at Columbia University. She had a 35 year tenure, a career, rather, in education, all within the New York City Board of Education, New York City system; that is. She occupied various positions as an educator and administrator. Her career included some noteworthy accomplishments, including her successful proposal in the late 1960s for a program called High School Redirection and her work as an interim acting principal in the late 170s at Boys and Girls High. Ms. Joseph is an alumni of Girls High in Brooklyn.

In September of 1987, Ms. Joseph was selected by the

Community School Board 15 to be principal at PS 27, an elementary school in the Red Hook section of Brooklyn. PS 27 is one of approximately two dozen schools in that district, District 15. Red Hook is, in a sense, a forgotten neighborhood in Brooklyn, isolated from the rest of south Brooklyn by the Gowanus Expressway and it has been suffering for decades from the worst sort of urban problems. It's a high crime neighborhood with a seemingly intractable drug problem. Those problems have a way of influencing schools in neighborhoods so afflicted and Ms. Joseph inherited a school in which the math and reading scores of the students on standardized tests were chronically low.

In September of 1987, the superintendent of District 15 was William P. Casey. Mr. Casey is white. He had started as a teacher in the New York City school system in 1963, worked as a member of the superintendent's staff in District 15, had been a principal in that district and became superintendent in 1987 after the appointment of plaintiff as principal of PS 27. He remained superintendent until May of 1997 when he became the Chief Executive on the Chancellor's staff, the position he currently occupies.

Newly appointed principals serve out a probationary period during which their performance is evaluated. At the time plaintiff was appointed principal, the probationary period for supervisors such as herself is three years. During the 1987 to '88 school year, plaintiff was sent several letters about problems at PS 27 and deficiencies in her supervisory

performance. In a letter dated March 31st, 1988, Casey informed Joseph -- forgive me, you're both present. Forgive me for just referring to you by your last names. I mean no disrespect by it.

Casey informed Joseph about a meeting he had with parents of PS 27 students, including the executive board and members of the PTA to discuss concerns they had, especially with respect to what they perceived to be a lack of discipline in the school. These concerns included discipline at lunchtime, particularly in the school yard. They also concerned children in the hallways of the school, in the bathrooms of the school and the lack of a standard procedure for dealing with students whose teachers are absent, for whom there is no substitute teacher.

The concerns also included dismissal procedures, disruptive use of the public address system during the school day and the need for a uniform discipline code as well as the inappropriate use of a paraprofessional for what is known as door duty.

After summarizing the parents' concerns, Casey made seven specific requests of Ms. Joseph to address these problems. He concluded his letter by expressing appreciation for the plaintiff for all the time, thought and effort she had given so generously to the school, its children and its staff. He acknowledged his awareness of the many difficulties which she, as a newly appointed principal, faced and indicated that he would take additional steps to improve

cooperation and communication between the PTA Executive Board and the school administration. He also indicated his availability to discuss his requests in greater detail.

Although Ms. Joseph has made much of the fact that Casey met with parents in her absence, there was nothing improper in that. Casey had notified Ms. Joseph of the meeting and a superintendent's meeting with concerned parents can be a useful way to help principal/parent relations. That was the purpose of this meeting.

In a letter dated April 5th, 1988, in many instances, for the record I'll provide exhibit numbers. The exhibit number of this letter is Defendant's Exhibit 3. In this April 5th, 1988 letter, Casey commended plaintiff on the half-day school improvement staff development conference she had held. He also discussed four important issues which were raised and indicated that for the next staff development conference he expected Joseph and the comprehensive school improvement program committee, which I'll refer to from now on as the CSIP Committee, would be able to -- let me back up. Casey stated in this letter that he expected plaintiff and the CSIP Committee to be able to present and discuss the implementation of a discipline code that would be applicable school-wise to review the use of the recent $11 per student allocation to address the needs for supplies and materials, to report on a uniform plan for assigning children when teachers are absent and substitutes are not present and to review requests for additional staffing in priority of need.

The superintendent also noted that the Community School Board had approved the advertisement for an assistant principal position at the school. The $11 per capita allocation I just referred to could have been used to buy furniture at PS 27. In a few instances, there might be direct allocations from the Central Board of Education for the purchase of furniture but Casey testified in testimony that I credit that he would not have been able to buy new furniture for PS 27. Casey was able to replace computers at the school which had been reported to him to have been stolen, by adding additional money to the normal allocation for computers over the years after that reported theft.

During the 1987 to 188 school year, plaintiff's supervisory performance was deficient. She was informed of these deficiencies in a letter from Casey dated June 20th, 1988. It's Defendant's Exhibit 7. She failed to develop and disseminate and implement a school-wide discipline code. She continued the inappropriate assignment of a paraprofessional despite several requests for her to cease that practice and only cease that practice upon being ordered to do so. She failed to develop and implement a standard procedure for assigning children during the absence of teachers.

She had poor relations with, apparently, particularly the Executive Board of the PTA. She failed to develop a program to improve reading ability as indicated by standardized test results.

Ms. Joseph had other documented deficiencies and

perform as well, failed to timely submit requests -

MS. JOSEPH: I really can't hear very well. I need to hear you.

THE COURT: I'll do my best to keep my voice up. Ms. Joseph had other documented deficiencies and performance as well. She failed to submit timely requests for funding for federal and state programs. Throughout the trial there were references to Chapter One program and the PCEN program. Those are federal and state respectively funded programs for which Ms. Joseph failed to submit timely requests as required. She also failed to conduct and report on pupil vision and hearing screening. Many of the deficiencies for which Ms. Joseph was cited are deficiencies that did not exist in other schools in the district.

In his letter of June 20th, 1988, Casey noted his concern that student reading scores had fallen. He indicated that in the previous year 41.2 percent of the students who were tested performed the 50th national percentile or higher. However, for the 187-188 school year, the first of Ms. Joseph's service as principal, the preliminary review of the test results indicated that only 33.3 percent of the students tested performed at or above the 50th national percentile.

The superintendent concluded by indicating, concluded his letter; that is, by indicating that he was rating plaintiff's performance as doubtful for her first year of probation. A rating of doubtful is a conditional approval for continued probationary service which can be arrived at by the

superintendent only in the first year of a principal's probationary period. This rating and the reasons for it were set forth in the pedagogical supervisory personnel report for '87 to '88 for Ms. Joseph. That's Defendant's Exhibit 65.

Superintendent Casey gave plaintiff her rating at a conference with her. It was a pedagogical evaluation conference, not a disciplinary proceeding and for that reason he understood the procedures in the collective bargaining agreement effective at the time concerning notice and representation were inapplicable. I find he correctly so understood those procedures.

In accordance with the procedures contained in the Board of Education bylaws, Ms. Joseph appealed her doubtful rating in a letter of June 6th, 1989 to the Chancellor who denied the appeal, sustained the rating. District 15 provided ample support to PS 27 during the '87 to '88 school year. It was one of four schools in the district that received funds for Project Child, one of about a half dozen schools in the district that received funds under the Right to Read Program, one of two schools in the district that received funds for after-school and tutorial programs, the only elementary school in the district that was given a guidance dean position..

During the second year of Ms. Joseph's tenure as principal, she continued to exhibit deficiencies in her supervisory performance. That necessitated Casey's writing of letters for placement in her file. The deficiencies included the following:

Failure to timely submit her response to the special education monitor's documentation report of June 20th, 1988. That's reflected in Defendant's Exhibit 11.

She also failed to timely submit the school's mainstream plan. It's in Defendant's Exhibit 13.

She failed to timely submit a copy of her annual performance objectives for the '88-'89 school year as reflected in Defendant's 18.

She failed to submit vision and hearing screening reports for the '87 to 188 and '88 an '89 school year as reflected in Defendant's 19 and 29.

She failed ailed to timely submit the principal I s rating report of custodial services, as Defendants' 14, 17, 21 and 29 reflect.

She submitted an unsatisfactory and not acceptable CSIP plan as noted in Defendant's 25 and 27.

She submitted a grossly inadequate safety plan that was deficient in all seven categories except for establishing a chain of command as reflected in Defendants' 28.

She failed to meet the requirements of the Chancellor and Commissioner of Education with respect to teacher observation reports as reflect in Defendants' 31.

She exhibited a lack of administrative support for or a very important health program, the Lutheran Medical Center School Health Project and also exhibited problems collecting daily attendance data for the Good Shepherd Services Attendance and Improvement Projects, Anti-truancy project.

She continued her failure to meet expectations in reading proficiency and the increased number of student suspensions, despite the presence of a dean, a guidance counselor and full-time pull-out teacher, further reflected badly on the discipline problem in the school.

In some respects, for example, with regard to performance objectives and the hearing reports and the rating of custodial services, Casey did not have to write to any other principal in the district regarding failure to perform those administrative duties.

In a letter dated March 2nd, 1989, Casey asks Ms. Joseph to provide a written response to a letter dated February 15th, 1989 from the United Federation of Teachers District 25 representative which complained about Ms. Joseph's conduct with regard to the supervisory selection process for the assistant principal's position. The representative indicated that a letter that supported the candidacy of a staff member for the assistant principal's position which was signed by a group of teachers was circulated at the school during the school day. The letter further alleged that Ms. Joseph had interfered with union activities at the school, had refused to honor the chapter leader's request to ask the teacher to stop circulating the letter.

On May 15, 1989, three grievances were heard at step 2, which is the superintendent's level. They were heard by the superintendent's designee. In all three cases the grievance were teachers at PS 27 who were represented by the union chapter leader.

One grievance complained about, among other things, the lateness in the formulation and distribution of the school's discipline code and that repeated requests at step 1, which is the principal's, level were not heard. That grievance was sustained.

The substance of the other two grievances are not as significant as the fact that the grievances were made and proceeded to the superintendent's level, to level 2. It was rare that such grievances proceeded to that level and Ms. Joseph's ability to resolve these matters at the school level reflected adversely on her administrative abilities.

In the 1989 to '90 school year, which is the third year of Ms. Joseph's tenure, an assistant principal was hired. The hiring process involves soliciting applications, reviewing those applications, circulating them to the district board members, the superintendent's office, the Parents Association. Each of those groups could suggest names from the pool of applicants for an interview. Those selected for interviews were interviewed by a screening committee consisting of a tenured principal, parents and members of the school Board. Each screening committee would submit their recommendations for a formal interview which was to be conducted by the superintendent and the board which could be audited by parents and the principal. The board and the superintendent would then meet in executive session during which the superintendent would make recommendations and the board would determine who would be appointed.

With regard to the appointment of the assistant principal at PS 27, Superintendent Casey contacted Ms. Joseph to determine if there were any candidates she wanted added to the list for the initial screening. He learned that she wasn't familiar with the list of applicants and hadn't discussed the issue with the PTA. This was unusual. That sort of involvement at that stage in the hiring process was expected of principals. Prior to making his recommendation to the board, Casey contacted plaintiff again and informed her of his intended recommendee. She disagreed with his recommendation but that recommendation of Lawrence Saunders was the result of a well-founded belief that a strong administrator would complement Ms. Joseph's strengths and provide the administrative help she plainly needed at PS 27.

A letter dated June 26th, 1989 from Casey to plaintiff regards an incident that occurred at a public meeting before the school Board. Mr. Casey's letter discusses a letter that was written on PS 27 stationery but signed only by the PS 27 CSIP Committee which was read and distributed at a public meeting of the Community School Board of District 15 on June 22nd, 1989.

The letter read at the meeting was highly critical of the superintendent and the school board with regard to the staffing and support of PS 27. In fact, the criticism was unwarranted. Casey's letter which is Defendant's Exhibit 34 details the considerable support Ms. Joseph and her staff at PS 27 had in fact received from the district. I won't detail that

support here except to refer to Defendant's Exhibit 34.

The superintendent concluded that letter by stating that he considered Ms. Joseph's silence when the letter was read at that public meeting and specifically the tacit approval of the letter that was indicated by her silence to be highly unprofessional. It seems to me it doesn't matter to me at this stage whether or not Mr. Casey was right.

I find this incident significant because it crystallizes, in a sense, a serious administrative deficiency that the evidence overwhelmingly established to be present at PS 27, to be present in Ms. Joseph. If there were perceived inadequacies on the part of her -- excuse me, if she or the people at PS 27 in fact perceived inadequacies on the part of District 15 in dealing with PS 27 and its needs, it was her job to deal with the district and to address those inadequacies to her supervisor, the superintendent. She didn't do that. None of the complaints in the CSIP letter that was read in that public meeting had been brought to the attention of the superintendent. Her inability to deal within the administrative process established by the Board of Education reflected significantly and adversely on her ability to be an administrator within PS 27.

Also on June 26th, 1989, Casey informed Joseph that her rating for the 188-189 school year was unsatisfactory. The unsatisfactory rating was reflected in her 188 to 189 pedagogical supervisory personnel report. That report is Defendants' Exhibit 33, or it's attachment, part of it, to

Defendants' Exhibit 33.

The reasons for the rating are set forth in the report. I'll read them from the exhibit.

Reason number 1, failure to provide for the safety and welfare of children as evidenced by your lack of attention and/or adherence in a timely fashion to chancellor's regulations and district requirements to the following areas; school safety plan, discipline code/plan, pupil vision and hearing screening.

Reason number 2, failure to plan for instructional and school programs by lack of your attention, compliance to district and central board requirements for the following areas. Chapter 1/P E C N programs, special education monitor's report, school mainstream plan.

Reason number 3, failure to achieve effectiveness in administration -- excuse me, in administrative functioning of school as evidences by your lack of attention and support and/or adherence to district requirements for the following areas. Lutheran Medical Center's Health Service Program, Good Shepherd Services Attendance Improvement Program.

Reason number 4, failure to meet required professional and supervisory responsibilities as evidenced by your disregard for required observation reports, custodial ratings, timely submission of annual performance objectives, submission of an acceptable CSIP plan.

Reason number 5, failure to provide professional leadership as evidenced by your inappropriate role during the

assistant principal selection process and CSIP Committee process.

I find those reasons set forth in this pedagogical evaluation -- excuse me, pedagogical supervisory personnel report were both the actual beliefs of the superintendent and that they were held in good faith.

During the '89 to 190 school year, the administrative functioning of PS 27 showed some improvement. This was due, in significant part, to the appointment of the assistant principal. In addition, during that year, Ms. Joseph participated in a mentoring program called the Supervisory Support Program in which she was mentored by another experienced principal and was not supervised by Superintendent Casey. At the conclusion of that year, it was agreed between Ms. Joseph and Casey that her probationary period which had come to the end of its third year would be extended for one more year and as part of that agreement, the superintendent rated Joseph's performance as satisfactory for the '89 to '90 school year. In his June 27th, 1990 letter which is Defendant's Exhibit 36, the superintendent reiterated to Joseph his serious concerns, including continuing decline in pupil achievement in reading and math scores, the need for improvement in pupil attendance, the need for leadership and planning, program implementation and staff development.

Subsequently a formal agreement extending the probationary period was executed. I believe that's Defendant's Exhibit 39. Pursuant to that, plaintiff agreed to

a one-year extension of her probationary period.

Defendant Exhibit 36 which is the letter I referred to a moment ago, June 27th, 1990 letter, is somewhat of an important document given the way this case was presented and tried. A great deal of significance is accorded that letter by the plaintiff. I think the best way to describe the significance accorded that letter is by reference to pages 468 and 469 of the record at which the cross-examination of Mr. Casey based on that letter was conducted. There's a certain respect although this is not a breach of contract case, there's a certain respect in which Defendant Exhibit 36 is characterized by Ms. Joseph's attorneys as an agreement, an agreement to give Ms. Joseph tenure if she will in fact raise the reading and math scores for the 1990-'91 school year. Of course, this is not a breach of contract case. There's no allegation of that, but I can't help but point out in passing as I make these findings of fact, my disagreement with that as an accurate characterization of that letter. In fact, there were a number of concerns on the part of the superintendent at that time regarding Ms. Joseph's performance as a supervisor in that school. Reading and math scores were part of it but the record, much of which I've already described, supports his view that there were broad-based administrative deficiencies on the part of Ms. Joseph and it simply is not a fair characterization of that letter to suggest that it reflected an agreement on his part that if one particular aspect of a principal's performance, which is reading and math scores

were improved upon, that he would therefore grant her tenure.

During the 1990 to '91 school year, Ms. Joseph's administrative and supervisory performance continued to exhibit deficiencies resulting in additional letters being placed in her file. For example, the annual school inventory report was not timely filed. By February of 191 she had filed only six professional performance reviews and by June 21st of '91, she had filed only 27, failing to meet the requirements.

The safety plan was found to be deficient in three of seven categories. There were violations in the lunch program performance standards. The Lutheran Medical Center had discontinued its health program because she failed adequately to support it. In his letter of June 18th, 1991 which is Defendant's Exhibit 50, Casey summarized Ms. Joseph's continued difficulty in achieving effectiveness in administrative functioning, in the administrative functioning of PS 27.

In a memorandum dated April 9th, 1991 which is attached to Defendant Exhibit 52, School Chancellor Joseph Fernandez wrote to Superintendent Casey to inform him that one school in the district, PS 27, had shown a pattern of poor performance or extremely poor performance. The memorandum also stated that the tenured principal in that school was therefore eligible for recommendation to transfer to the professional development center for upgrading in her skills. Of course, Ms. Joseph was not at that point a tenured principal.

During the time Ms. Joseph was principal of PS 27, it was the lowest performing school in the district in both reading and math. During that period of the approximately 620 elementary schools in the city, PS 27 ranked between 600 and 610. At the end of that school year, the last of her tenure -- that's an inappropriate word to use in this trial -- the last year of her principalship at PS 27, the superintendent informed Ms. Joseph that he was denying her certificate of completion of probation; that is, he was denying her tenure and that her service under her pending appointment would terminate as of the close of business on August 25th, 1991.

Superintendent Casey rated Ms. Joseph as unsatisfactory in her 190 to '91 pedagogical supervisory personnel report. That report is Plaintiff's Exhibit 56. The reasons for the unsatisfactory rating were her failure to adequately address continued poor pupil achievement, particularly in the areas of reading and mathematics, failure to achieve effectiveness in the administrative functioning of the school and in responses to district and central board requests; failure to address pupil and community needs as evidenced by a lack of support for a school-based health service program and a failure to achieve the minimum standard of pupil attendance.

At the end of the '90 to '91 school year, Casey had Josephine Urso perform an analysis of the unofficial test results of the PS 27 students. Ms. Urso was testing coordinator at District 15. She had done these analyses many

times, on many occasions in the past. At that stage of the school year, analyses of test data necessarily rely on the raw data provided by the testing authorities. In fact, the official results are not provided to the schools until later in the year, more specifically, as I recall the evidence, in the fall, but the preliminary data, the test results themselves are provided to the schools and they are helpful, in fact sometimes critical to the school for planning purposes and for administrative tasks that have to be performed before the official results are available.

I heard a good deal of testimony regarding Ms. Urso's test results or rather the results of her analysis. They are attached to Plaintiff's Exhibit 5 and a great deal has been made of the deficiencies in these analyses by plaintiff. Attachment C, for example, of Plaintiff's Exhibit 5, addresses the performance of the children at PS 27 and the number of those children who performed at or above the 50th percentile. It reports that, according to that barometer, performance went down from 26.2 in the '89 to '90 school year to 21.4 percent in the '90 to 191 school year. It turns out Ms. Urso relied on data that used a combination of test results. It also didn't compare precisely the same grades. I should add that Attachment D also provides an analysis of math results for PS 27 students.

As I began to say, her data used a combination of test results, didn't compare precisely the same grades and included students from the Brooklyn New School; a separate

educational institution that was located within the building that houses PS 27.

I heard testimony from Ms. Canner who testified to the results she achieved by correcting the deficiencies in Urso's data. In fact, the reading scores show a slight improvement from 21.1 percent to 25.8 percent for those two school years, 189 to '90 and then '90 to 191. That's with the Brooklyn New School students included. Without the Brooklyn New School students the improvement is from 15.8 percent to 19.3 percent. Dr. Canner also pointed out inaccuracies in the math scores reported by Ms. Urso and referred to in the June 19th letter from Casey to Joseph.

As I said, much has been made of Mr. Casey's reliance on Urso's report and analysis in deciding to deny tenure. In fact, I credit the testimony of Mr. Casey that he relied on a wide variety of factors in making his adverse employment decision with regard to the plaintiff.

He considered her performance over the entire four year probationary period and the achievement skills in reading and math over that entire period. He considered her ability to do the job as principal, to perform the administrative function required of a principal.

The cross-examination of Superintendent Casey, in my judgment, reveals not only that; that he relied on a broader array of considerations than these test results, but it also reveals a fact that I respectfully submit to the plaintiff which is in dispute here is very much, it seems to me, a replication

of the dispute that Ms. Joseph had with the Board of Education. By that I mean as follows: The plaintiff made a point during the cross-examination of Mr. Casey's reliance on the failure of the Lutheran Hospital program when, according to plaintiff, that was really the fault of the parents of the PS 27 students. The point was further made that Mr. Casey relied on his concerns about the lunch program at PS 27 when, according to plaintiff, those were really the problems with the lunch program, really Saunders, fault, not Ms. Joseph's.

The cross-examination revealed as much as the evidence presented by the defendant that Mr. Casey, in fact, held Joseph accountable for failings at the school that may well have, in fact, been the result of inabilities on the part of people under her supervision, but there's no federal claim in that. A superintendent in a New York City school, as far as Title VII is concerned, as far as a federal court is concerned, a superintendent in the New York City public school system is perfectly entitled to hold a principal accountable for administrative failures in a school that doesn't violate the federal anti-discrimination laws. I must say there was a certain point in this short trial when it appear as though I was hearing factual arguments that were better addressed to the Board of Education and I imagine were addressee to the Board of Education in Ms. Joseph's appeal of the denial of tenure.

Also, with regard to the reliance on Ms. Urso's data,

I must also point out when Mr. Casey was apprised at the time because Dr. Canner's analysis was conduct very shortly after this information was first imparted by Casey to Joseph, when he was apprised of Dr. Canner's analysis, he recognized there were errors in the analyses conducted by Ms. Urso. He agreed to make an amendment to the letter to her file, to Ms. Joseph's file, based on Dr. Canner's analysis. He also testified in testimony that I credit that he would not have reached a different conclusion with regard to the tenured decision had those errors in Attachment C to Plaintiff's Exhibit 5 and attachment Exhibit D to Plaintiff's Exhibit 5 been brought to his attention before that decision was made.

During Casey's tenure as Superintendent of District 15, the district actively recruited minority supervisors as supervisors and referring to principals and assistant principals. These efforts bore fruit. During that period the percentage of minority supervisors in the district doubled from 20 percent to 40 percent. During Casey's 10 years as superintendent, he gave unsatisfactory ratings to only three principals. One of them, of course, was Ms. Joseph. The other two were white principals -- sorry, rather white supervisors.

Against that backdrop, it's been argued to me by plaintiff that certain incidents demonstrate racial animus on the part of Superintendent Casey. There is reliance placed upon a statement that Ms. Joseph testified was made to her by Casey, a statement to the effect that Ms. Joseph, of all

people, ought to be able to get along with the parents of the PS 27 students.

Another statement attributed to Casey by the plaintiff is that with regard to a graduation ceremony to be held for the sixth graders at PS 27, Casey stated that the graduation would be the only one that most of these children will ever have or will ever know. It would have been helpful with regard to this statement if Mr. Casey had addressed it in his testimony. The evidence provides ample basis for his exasperation at Ms. Joseph's inability to deal effectively with the parents of the students in her school. As I say, it would have been helpful had this been addressed by Mr. Casey, but I cannot find with regard to either of the two statements I mentioned, I cannot find in the context of the entire case that these statements either independently or in the aggregate evidence a racial animus.

Another incident that is relied upon by plaintiff as evidencing racial animus on the part of Mr. Casey pertains to the Lutheran Medical Center's program at PS 27. This is not a statement attributed to Casey, but rather to a nurse, Nurse Parker from the Lutheran Medical Center. To back up just a moment, this was an important program at PS 27. It was a program pursuant to which health services were made available on site.

There was an objection to this program on the part of Ms. Joseph and on the part of some parents of PS 27 students on the ground that the Lutheran Medical Center was itself

located in an inaccessible place, vis-a-vis PS 27, and that, for example, compared to Long Island College Hospital, it's much more difficult in the event emergency services were needed; it would be much more difficult for PS 27 parents to get to Lutheran Hospital as compared to the Long Island College Hospital.

On the other hand, there was a legitimate concern on the part of the district, on the part of Casey that a program that provided enormous benefit in the form of on-site health services that was not being adequately supported by the principal. That frustration was well founded because the advantages of having the health services at the school building were enormous. I say that not to disparage the parents' concern or the principal's concern regarding the inaccessibility of Lutheran Hospital itself for emergency services. It's against that backdrop that this letter from the PTA of PS 27 dated May 17th, 1990 was sent to the school Board president of District 15, Norman Fruchter, a letter that does make reference to Nurse Parker's statement that the parents of PS 27 students do not have phones, cannot be reached.

I have no question that that statement was perceived by the members of the PTA and by personnel at PS 27 as evidencing bias and contempt. No question in my mind that they felt that way. However, on the separate question whether the failure to investigate as a racial or biased incident, this event, failure to investigate by Superintendent

Casey, I'm not persuaded by the plaintiff's arguments.

The overarching concern on the part of the district was the existence of this program. It is not the case, I conclude, that a review of this letter by Superintendent Casey would reveal to him the racist or biased nature of Nurse Parker nor do I conclude the conduct of Superintendent Casey in this regard evidenced racial bias. In fact, the obvious concern on the part of the district at the withdrawal by Lutheran Hospital of this program and the efforts undertaken to get the principal of the school to support that program suggest otherwise to me. I just cannot conclude in the context of this case that this evidence is racial bias on the part of Mr. Casey.

There is some reliance placed on the allegedly disparate treatment of Milicent Goodman who was the principal of PS 38. Plaintiff claims the failure to treat Ms. Goodman in the manner that Ms. Joseph was treated evidences the racial bias that plaintiff claims she was subjected to. I'm not persuaded by this argument as well. The record before me is threadbare with regard to the performance of Ms. Goodman.

There has been some evidence presented to me of test results in Ms. Goodman's school but I'm persuaded that the evaluation of administrators in the public schools within District 15 was based on a far broader array of factors; that there were many parameters in the evaluation process and I'm not persuaded that before me are two similarly performing principals; that is, Ms. Goodman and Ms. Joseph. So, I

assign no weight, I ascribe no weight to the fact that Ms. Goodman was not denied tenure or that her file does not reflect lesser forms of administrative sanction.

Let me proceed to my conclusions of law. As I mentioned, this case is brought under Title VII of the Civil Rights Act. Title VII makes it unlawful for an employer to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual because of that person's race. That's 42 U.S.C. Section 2000(e)(2)(A)(1).

The standards applicable to a Title VII claim are well established in McDonnell Douglas Corp. versus Green, 411 U.S. 792, a 1973 case. The Supreme Court established an allocation of the burden of production and order for presentation of proof in Title VII cases.

A plaintiff alleging a violation of this statute makes out a prima facie case by showing membership in a protected class, qualification for the position and adverse employment action and the ultimate filling of the position by a person not of the protected class. That standard is set forth in McDonnell Douglas at page 802, in Texas Department of Community Affairs versus Burdine, 450 U.S. 248 at 252-253, a 1981 decision.

The burden of establishing a prima facie case is not onerous, according to the Supreme Court in Burdine at 253. In fact, the plaintiff's burden of establishing a prima facie case has been described as minimal and described that way to the Supreme Court itself in St. Mary's Center versus Hicks, 509

U.S. 502 at 506. It's a 1993 decision.

I conclude a prima facie case has been established here. The establishment of the prima facie case creates a presumption that the employer unlawfully discriminated against the employee. That presumption means unless the defendant comes forward with a nondiscrimination reason for the employment decision, the plaintiff's case can be regarded by the fact finder as sufficient, this effective presumption created by the McDonnell Douglas test, is sufficient for the plaintiff to carry the day if it's not rebutted. So, the defendant bears a burden of producing an explanation, a burden of producing evidence that the adverse decision was taken for legitimate nondiscrimination reason.

The purpose of this test is to force a defendant to give an explanation for its conduct in order to prevent employers from simply remaining silent while the plaintiff attempts a very difficult process of proving discriminatory intent. There's a helpful discussion of this in the Burdine case at pages 254 to 256.

Although the McDonnell Douglas test shifts the burden of production to the defendant, the ultimate burden of persuading the trier of fact, in this case me, that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. The question becomes whether the plaintiff has shown by a preponderance of the evidence that the defendant is liable for the alleged discriminatory conduct. Here, I've been provided with ample and in my respectful

judgment, overwhelming evidence of a nondiscrimination reason for the denial of tenure to Ms. Joseph. In fact, there are a number of reasons that have been presented to me. The overarching description of those is a failure on her part to adequately preside as an administrator over PS 27. 1 won't belabor my conclusions of law with a recitation of the numerous ways in which she was found over the course of her four-year period to have failed in her administrative responsibilities.

I want to emphasize the function of a federal judge in a case like this is not to second-guess the Board of Education, is not to review the record and determine whether or not the Board of Education correctly denied tenure to Ms. Joseph in this case or correctly made an adverse employment decision with regard to any of the employees who come into court with a Title VII claim. My function at this point is to determine whether there was racial discrimination in that decision; more specifically, to determine whether or not the plaintiff has bore her burden of proof that the decision to deny her tenure was the result of intentional discrimination. I cannot on this record and I do not make that conclusion.

The plaintiff has failed to carry that burden of proving intentional racial discrimination, and for those reasons I am constrained to deny her claim and to direct the clerk to enter judgment for the defendant.

Is there any claim I have not addressed, any finding, any aspect of the facts as to which I should have made a

finding of fact or any legal question before me as to which I've failed to make a conclusion of law?

MS. JOSEPH: Me or my attorney?

THE COURT: Counsel.

MS. JOSEPH: Me?

THE COURT: Your attorney.

MR. NAGER: I don't see any, your Honor.

THE COURT: Counsel for defendant?

MS. BUTLER: No, your Honor.

THE COURT: Have a good day.

Supreme Court, U.S.
FILED
AUG 13 1999
OFFICE OF THE CLERK

No. 99-167

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

DOROTHY JOSEPH,

Petitioner,

- v -

THE NYC BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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August 13, 1999

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COUNTER-QUESTION PRESENTED

In holding, in Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994), that the 1991 amendments to Title VII providing an expanded right to damages and a new right to a jury trial were not retroactive and hence could not be applied to a case pending on appeal at the time the amendments became effective, did this Court also necessarily and explicitly reject the idea that the amendments could be applied in a case commenced post-enactment, but based on pre-enactment conduct?

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RELEVANT STATUTORY PROVISIONS

The relevant portions of 42 U.S.C. § 1981a providing for the right to a jury trial where litigants seek the compensatory and punitive damages newly authorized by the Civil Rights Act of 1991 are set forth on pages 8-9 of the instant Petition for a Writ of Certiorari ("Petition"), to which the Court is respectfully referred.

STATEMENT OF THE CASE

1. Factual Background

Petitioner was employed by the respondent Board of Education for many years before being appointed the principal of P.S. 27, in Red Hook, Brooklyn, in 1987 (JA186-205).[1] P.S. 27 is in Community School District 15 and the Superintendent of District 15 at all relevant times, and who also was appointed in 1987, was William Casey (JA467-68). The usual probationary period for a principal is three years (JA559). In 1990, after petitioner had completed three years as principal at P.S. 27, petitioner and Mr. Casey agreed to extend petitioner's probationary period for one additional year (831).

In 1991, after petitioner had completed four years as probationary principal at P.S. 27, Mr. Casey denied tenure to petitioner (JA856). The body of the June 21, 1991 letter from Mr. Casey to petitioner communicating this decision reads in full as follows (JA29):

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[1] Numbers in parentheses prefixed by the letters "JA" refer to pages in the Joint Appendix submitted on the appeal to the Court of Appeals. Numbers prefixed by "App." refer to the appendix to the instant Petition.

> This letter is to inform you that in accordance with Section 2573 Subdivision [sic] of the State Education Law, I am denying your Certification of Completion of Probation in Community School District 15.
>
> Under the collective bargaining agreement between the Board of Education and the Council of Supervisors and Administrators, you are entitled to the review procedure before the Chancellor as prescribed in Article 5, Section 5.3.4C of the By-laws of the Board of Education.
>
> Please be advised that your service under this appointment shall terminate as of the close of business on August 25, 1991.

Section 5.3.4C of the by-laws contains procedural provisions only, i.e., it grants no substantive rights (JA38).

Pursuant to the By-laws, the Chancellor appointed a committee of three individuals to hear petitioner's challenge to the denial of tenure (JA40). That committee held hearings in November and December of 1991 and recommended that the Chancellor concur with Mr. Casey's determination (JA40-51). On February 4, 1992, the Chancellor issued a letter stating that he concurred with the recommendation of the committee (JA52). On February 13, 1992, Mr. Casey sent petitioner a letter in which he stated that he had reviewed the report of the Chancellor's committee and that he was "reaffirming my previous action in denying your certification of completion of probation" (JA53).

Meanwhile, on August 16, 1991, petitioner and the respondent Board had entered into an agreement that permitted petitioner to take advantage of respondent's early retirement program while maintaining her challenge to her denial of tenure, rather than continuing in her former tenured position of assistant principal (JA30-32). In other words, the Board permitted petitioner to retire and agreed not to argue that any administrative or judicial action brought by petitioner would be moot because of her retirement (JA31). In addition, that agreement states in part (JA31):

> In the event that [petitioner] is successful in a review of the denial of satisfactory completion of her probationary service pursuant to Article 5.3.4 of the by-laws of the Board of Education or any subsequent final court proceeding, the Chancellor will recommend to the Superintendent of Community School District 15 that he reconsider his decision to deny her satisfactory completion of her probationary service and that the Superintendent of Community School District 15 consider a request by Ms. Joseph to rescind her retirement.

2. The Proceedings Below

On or about March 6, 1992, petitioner filed a complaint of discrimination in employment with the New York State Division of Human Rights (JA54-56). That complaint states in part, "On June 21, 1991, I received notification that my tenure was denied" (JA55).

Over two years later, on or about June 24, 1994, petitioner commenced suit against the respondent Board of Education in the United States District Court for the Eastern District of New York (JA13-20). She sought, inter alia, compensatory and punitive damages (JA13) for alleged discriminatory employment practices in connection with her service as a probationary principal during the period beginning with her appointment as principal in 1987 and ending with her retirement in August 1991 (JA15). The complaint states, in pertinent part, "Plaintiff was notified that she was being denied tenure on June 21, 1991, and left her employment in August 1991" (JA15). Far from alleging that discrimination occurred beyond this period, the complaint does not even mention the review process undertaken by the Chancellor's committee in November and December of 1991, the Chancellor's February 1992 approval of the committee's report, or the district superintendent's "reaffirmation," also in February 1992, of his June 1991 decision to deny tenure.

By notice of motion dated July 18, 1996 (JA26) and filed December 24, 1996 (JA85), the respondent Board moved to strike petitioner's jury demand and claims for compensatory and punitive damages. That relief was granted by the District Court in an unreported memorandum and order dated February 3, 1997 (JA85p-85w) (copy annexed hereto as Appendix A).

After the conclusion of a 4-day bench trial in January 1998 (JA99-857), the District Court entered judgment in favor of the respondent Board on or about February 2, 1998 (App. 35). By notice of appeal dated February 27, 1998, petitioner appealed both from the February 3, 1997 memorandum and order striking her jury

demand and claims for compensatory and punitive damages, and from the February 2, 1998 final judgment on the merits in the Board's favor (JA85-x). In a March 16, 1999 decision, reported at 171 F.3d 87 (App. 1-32), the U.S. Court of Appeals for the Second Circuit found petitioner's arguments without merit and unanimously affirmed the District Court's judgment (App. 32).

OPINIONS BELOW

1. The District Court's Unpublished Decision on the Motion to Strike the Demand for a Jury Trial and the Claims for and Compensatory and Punitive Damages[2]

The District Court (Gleason, D.C.J.) ruled that petitioner was not entitled to trial by jury, nor to assert claims for compensatory or punitive damages, because her cause of action arose before the November 21, 1991 effective date of the amendments to Title VII which first gave plaintiffs in Title VII cases the right to a jury trial and to compensatory and punitive damages in some circumstances (Appendix A, infra, at 14-21). Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C.

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[2] The instant Petition annexes only a copy of the pages of the transcript of the bench trial containing closing arguments and the District Court's findings of fact and conclusions of law as to petitioner's substantive claims (App. 37-93), which petitioner does not contend need further review by this Court. The jury trial/damages issue was addressed by the District Court in its unpublished memorandum decision of February 3, 1998, annexed hereto as Appendix A.

§ 1981[a]); Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994). The Court, citing Miller v. International Telephone and Telegraph, 755 F.2d 20, 23 (2d Cir., 1985), stated that a claim such as petitioner's ripens when the plaintiff receives definite notice of discharge (id. at 16).

The District Court, focusing its analysis on the accrual issue,[3] began by quoting section 2573[6] of the New York Education Law, which reads in part as follows:

> In a city having a population of four hundred thousand or more, at the expiration of the probationary term of any persons appointed for such term, the superintendent of schools shall make a written report to the board of education recommending for permanent appointment those persons who have been found satisfactory and such board of education shall immediately thereafter issue to such persons permanent certificates of appointment.

Id. at 17. The Court noted that with the decentralization of the New York City schools, the powers of the superintendent as here relevant were transferred to the district superintendents (id. at 17, n.4).

The Court then held that under both a literal reading of this statute, and decisions of the New York State Court

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[3] The Court observed that "[b]oth parties agree that in order for plaintiff to be entitled to the benefits of the 1991 Amendments, her claim must have ripened after November 21, 1991" (id. at 17).

of Appeals, "the decision not to retain a principal beyond the probationary period is within the sole province of the district superintendent" (id. at 17). The Court also noted that the pedagogical review manual submitted by petitioner clearly states that tenure decisions of district superintendents are final and that the district superintendent can adhere to his or her initial denial regardless of the recommendation of the Chancellor (id. at 18-19).

The Court rejected petitioner's arguments that the denial of tenure was not a final decision until all reviews had been exhausted and that her claim did not accrue until a reasonable person would have known that her rights had been violated (see id. at 19). The District Court followed Delaware State College v. Ricks, 449 U.S. 250 (1980), in which this Court held that an employment discrimination claim accrued when a professor was denied tenure and not when his grievance concerning the denial of tenure was denied (id. at 19-20). The Court noted that petitioner claimed only race discrimination by Mr. Casey and did not claim any racial animus on the part of the Chancellor (id. at 20). The Court also found that petitioner was aware that the June 21, 1991 denial by Mr. Casey was final, both because her experience of over 30 years in the school system indicates that she was aware of the rules governing the tenure process, and because in her complaint to the State Division of Human Rights she identified June 21, 1991 as the date of the discriminatory act and the date of the most recent discriminatory activity (id. at 20).

2. The Decision of the Court of Appeals on the Same Issue, Reported at 171 F.3d 87

After reviewing in detail the District Court's reasons for rejecting petitioner's claimed right to a jury trial and to compensatory and punitive damages, 171 F.3d 87, 89-90, the Court of Appeals agreed that, in Landgraf v. U.S.I. Film Products, supra, this Court had specifically ruled that the provisions of 42 U.S.C. § 1981a providing for enhanced money damages do not apply "to conduct occurring before November 21, 1991," i.e., to cases arising prior to enactment of the 1991 amendments. 171 F.3d at 91, citing Landgraf, 511 U.S. at 282-286. Following this Court's reason in Landgraf, 511 U.S. at 281, the Court of Appeals further concluded that, "[s]ince the right to a jury trial is expressly linked [in the legislation] to a request for damages allowable under § 1981a, the right to a jury trial also does not apply when the conduct complained of occurred prior to November 21, 1991." 171 F.3d at 91.

Turning next to petitioner's claim that the complained-of conduct "was not completed until February 4, 1992, at the earliest, when the Chancellor concurred in Casey's decision not to grant [petitioner] tenure," 171 F.3d at 91, the Court of Appeals rejected that proposition, holding that the law is squarely to the contrary. Id. The Court observed that in Delaware State College v. Ricks, 449 U.S. 250, 258-259 (1980), this Court had specifically held that "[a] claim under Title VII for discriminatory denial of tenure arises when the employee receives definite notice of the tenure decision," 171 F.3d at 91, "even if the actual discharge date is later, ... and even if the tenure denial is subject to a grievance procedure, administrative review, and possible reversal ..." Id. (specific page

citations to Ricks omitted). Like the District Court, the Court of Appeals found the conclusion in Ricks even more compelling here because, under New York law, "the reviews of the district superintendent's denial of tenure to a probationary principal are entirely advisory." 171 F.3d at 92. Accordingly, the Court held as follows (id.):

> Casey's decision to deny [petitioner] tenure and terminate her appointment as P.S. 27's principal was final as of the time it was made in June 1991. His February 1992 letter to Joseph reaffirming that decision did not make his decision any less final. Since [petitioner] has not asserted any claim that discriminatory conduct occurred after November 21, 1991, the district court properly struck her demand for a jury trial.

REASONS FOR DENYING THE WRIT

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT HAS ALREADY HELD THAT THE 1991 AMENDMENTS TO TITLE VII PROVIDING FOR THE RIGHT TO A JURY TRIAL DO NOT APPLY TO PRE-ENACTMENT CONDUCT.

We note, as a preliminary matter, that although petitioner ostensibly asks this Court to review three questions (Petition at i), these reduce to a single legal issue, to wit, whether this Court's decision in Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994), holding that the jury trial option and compensatory and punitive damages

provisions contained in 42 U.S.C. § 1981a are prospective only, is controlling where a Title VII claim is based on conduct engaged in prior to enactment of the 1991 amendments to that statute, but where suit was not commenced until after the legislation's November 21, 1991 effective date (Petition at i, Question 3). In framing the issue in terms of pre-amendment conduct, petitioner has effectively conceded that the courts below were correct in determining that her cause of action accrued upon her receipt of the June 21, 1991 pre-enactment letter informing her that she had been denied tenure and not upon completion of the review process in February 1992.

Thus, notwithstanding the fact that petitioner claims in her argument section, without elaboration, that the Court of Appeals somehow erred in holding that her claim accrued in June 1991 and not in February 1992 (Petition at 6-7), that alleged error is not, by her own definition, one of the questions proposed for review by this Court.[4]

Turning to the Landgraf issue as framed in the Petition's "Questions Presented" section (Petition at i), it is apparently petitioner's position that that decision is inapplicable because suit had been commenced in Landgraf prior to enactment of the 1991 amendments, whereas here petitioner's complaint -- although, as discussed above,

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[4] Should the Court not agree that petitioner has conceded this issue, we rely on the reasoning of the District Court and the Court of Appeals and submit that petitioner has failed to demonstrate the nature of any claimed error in their analysis of the proper accrual date under Delaware State College v. Ricks, 449 U.S. 250 (1980) and New York law.

concededly based on pre-enactment conduct -- was filed after the effective date of the legislation. Given that this Court specifically held in Landgraf that the new damages remedy in the 1991 amendments, and the jury-trial option attached to it, "is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent," 511 U.S. at 281-282, and given that this Court could not find any such intent despite an exhaustive search, petitioner focuses on a distinction without a difference. No one but petitioner could dispute that this Court unequivocally held in Landgraf that the dispositive factor in its retroactivity analysis was when the claimed discriminatory conduct occurred, not when suit was commenced. There is no question that, under Landgraf, the right to a jury trial provided to Title VII litigants seeking compensatory and punitive damages under the 1991 amendments is simply not available where claims are based on pre-enactment conduct. Petitioner's attempt to argue otherwise -- bolstered, without a single citation, by the conclusory claim that the decision below "is contrary to the holdings of some other circuits and other district courts" (Petition at i., 6) -- borders, we submit, on the frivolous.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL D. HESS,
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City of New York,
Attorney for Respondent.

LEONARD J. KOERNER,*
KRISTIN M. HELMERS,
of Counsel.

August 13, 1999

*Counsel of Record

APPENDIX A

February 3, 1997 Memorandum and Order of the U.S. District Court for the Eastern District of New York Granting Respondent's Motion to Strike Petitioner's Jury Demand and Claim for Compensatory and Punitive Damages.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DOROTHY JOSEPH,

Plaintiff,

- against -

NEW YORK CITY BOARD OF EDUCATION,

Defendant.

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NOT FOR PUBLICATION

MEMORANDUM AND ORDER

94-CV-3025 (JG)

APPEARANCES:

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BY: BRIGETTE DUFFY

JOHN GLEESON, United States District Judge:

On June 24, 1994, plaintiff, an African-American woman, filed the complaint in this action, claiming that she was terminated from her employment due to her race. Defendant moves to strike plaintiff's jury demand and claim for compensatory and punitive damages. For the reasons set forth below, defendant's motion is granted.

FACTS

Plaintiff, Dorothy Joseph, was employed by the defendant New York City Board of Education from 1956 until August, 1991. When first hired, plaintiff was a classroom teacher. She continued to work as a teacher, assistant principal, and acting principal until September 1, 1987, when she was made principal of Public School 27 ("P.S. 27"), an elementary school in Brooklyn. P.S. 27 is under the auspices of Community School District 15.

By letter dated June 21, 1991, Joseph was notified by William Casey, Superintendent of Community School District 15, that her Certification of Completion of Probation, which provides a principal with tenure, had been denied. Plaintiff was further instructed that her employment as principal of P.S. 27 would terminate as of the close of

business on August 25, 1991. Shortly thereafter, the decision was ratified by the Community School Board.

Pursuant to the terms of the collective bargaining agreement between the Board of Education and the Council of Supervisors and Administrators, which represents principals employed by the Board of Education, Joseph's denial of tenure was subject to "review" by the Chancellor of the Board of Education. This review was performed by a committee appointed by the Chancellor on November 8, 12 and 15, and December 3, 1991. The committee elected to ratify the decision of Superintendent Casey. The Chancellor signed off on the committee's recommendation on January 31, 1992. Superintendent Casey reaffirmed his decision in a letter to Joseph dated February 13, 1992.

Plaintiff alleges that Casey's decision to deny her tenure was motivated by racial animus. Joseph first brought her complaint to the New York State Division of Human Rights on March 6, 1992. Plaintiff received a right to sue letter from the Equal Employment Opportunity Commission on March 28, 1994.

On June 24, 1994, plaintiff filed the complaint in this case. In the complaint, Joseph alleges that there was a pattern of discriminatory actions by Superintendent Casey, including the denial of resources and cooperation from the Community School District office. Plaintiff states that these actions were designed to create inferior conditions at her school and poor performance by her students, so that the Superintendent would have reason to deny plaintiff tenure and to unlawfully terminate her employment. Plaintiff seeks injunctive and declaratory relief, along with compensatory and punitive damages pursuant to 42 U.S.C.

2000(e) et seq. ("Title VII"). Plaintiff also seeks costs and attorneys' fees, as authorized by 42 U.S.C. 2000e-5(k).

Defendant filed a motion on December 24, 1996, to strike the plaintiff's jury demand and the demand for compensatory and punitive damages.

DISCUSSION

Originally, plaintiffs in Title VII actions did not have a right to demand a jury trial. Wrensen v. City of New York, 826 F. Supp. 698, 699, 700 (S.D.N.Y. 1993). Title VII plaintiffs were also not entitled to compensatory, punitive or other damage awards other than for back pay and benefits. Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483, 1490 (1994). However, Title VII was amended on November 21, 1991, to allow plaintiffs the right to a jury trial and compensatory and punitive damages in some circumstances. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended 42 U.S.C. § 1981 and added at 42 U.S.C. § 1981(a) (1992)) ("1991 Amendments"). The 1991 Amendments do not apply retroactively, so in order for a plaintiff to be entitled to a jury trial, along with compensatory and punitive damages, the cause of action must have arisen after the enactment of the Amendments. Landgraf, 114 S.Ct. at 1508.

Both parties agree that in order for plaintiff to be entitled to the benefits of the 1991 Amendments, her claim must have ripened after November 21, 1991. A claim ripens when the plaintiff receives definite notice of discharge. Miller v. International Telephone and Telegraph, 755 F.2d 20, 23 (2d Cir. 1985). The question

presented is whether plaintiff received such notice prior to November 21, 1991.

The New York State Education Law, § 2573(6), states:

> In a city having a population of four hundred thousand or more, at the expiration of the probationary term of any persons appointed for such term, the superintendent of schools shall make a written report to the board of education recommending for permanent appointment those persons who have been found satisfactory and such board of education shall immediately thereafter issue to such persons permanent certificates of appointment.[5]

N.Y. Educ. Law § 2573(6) (McKinney 1994).

Under a literal reading of this law, the decision not to retain a principal beyond the probationary period is within the sole province of the district superintendent.

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[5] When originally written in 1935, § 2573 vested these powers in the central board of education and its superintendent, the predecessor to the current Chancellor. However, with the 1969 decentralization of the New York City schools, these powers were transferred to the district superintendents and community school boards. See Matter of Caraballo v. Community School Bd. Dist. 3, 49 N.Y.2d 488, 491-92, 426 N.Y.S.2d 974, 975-76 (1980) and N.Y. Educ. Law § 2590-f(6)a (McKinney 1994).

Section 2573 contains no provision for review or reversal of these decisions by the chancellor of the central board.

Additionally, the New York State Court of Appeals has repeatedly examined this provision of the Education Law and has clearly stated that the law applies as written. The discretion to grant tenure to a principal upon completion of the probationary period lies exclusively with the district superintendents. Matter of Taylor v. Berberian, 61 N.Y.2d 613, 471 N.Y.S.2d 843 (N.Y. 1983). The language of § 2573 also denotes a duty on the party of the community school board to comply with the tenure recommendations of the superintendent. Matter of Caraballo v. Community School Bd. Dist. 3, 49 N.Y.2d 488, 492-93, 426 N.Y.S.2d 974, 976 (N.Y. 1980).[6]

Additionally, Joseph has submitted a portion of the Board of Education Pedagogical Review Manual, published by the Board's Office of Appeals and Reviews. This manual clearly states that tenure decisions of district superintendents are final. See Plaintiff's Exhibit G at 25. The manual does not state that the findings of these reviews, subsequent votes by the local board, or recommendations of reversal by the Chancellor are binding upon the district superintendent. Indeed, the manual states

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[6] The plaintiff in Caraballo was an elementary school principal who was "recommended" for tenure by the district superintendent. However, the district school board refused to issue the Certification of Appointment officially granting tenure. The Court of Appeals held that the district school board's function was essentially ministerial, and thus it could not reverse the decision of the district superintendent. Caraballo, 49 N.Y.2d at 492.

that the district superintendent can stand on his or her original decision, regardless of the recommendations of the Chancellor's report. See Plaintiff's Exhibit G at 30. Based upon the applicable law, its interpretation by the Court of Appeals, and the internal regulations of the Board of Education, plaintiff was terminated pursuant to the June 21, 1991 letter.[7]

Plaintiff claims that she could not have known that the decision was "final" until all "reviews" had been exhausted. As § 2573 demonstrates, state law is clear that the decision was final at the time it was made by the superintendent. Joseph believes that a "reasonable person" would not have known that his rights had been violated at the time of the superintendent's initial notification.

Defendant responds by citing Delaware State College v. Ricks, 449 U.S. 250 (1980). In Ricks, a college professor was notified of a denial of tenure and filed a grievance challenging the decision. The Court held that a discrimination action ripened when the Ricks plaintiff was notified that he was not getting tenure, not when the grievance was denied. Hearing a grievance or an appeal is an effort to change a prior decision, not to influence the decision before it is made. Id. at 261. Aspirants for academic tenure should not ignore available opportunities to request reconsideration, but such requests cannot extend the

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[7] Even if this court were to allow the plaintiff to use her actual discharge date, August 25, 1991, as the date when her claims ripened, that date is still prior to the enactment of the 1991 Amendments, so she still would not be entitled to a jury trial or to claim compensatory or punitive damages beyond back pay.

limitations periods applicable to civil rights laws. Id. at 261, n.15.

As in the Ricks case, Joseph was denied tenure and was given the opportunity for review by another body. In both instances, the discriminatory action took place when the tenure decision was made, not when collateral reviews became final. This initial denial of tenure is the wrong for which plaintiff seeks a remedy. Indeed, Joseph does not complain about discriminatory animus by the central board or the Chancellor. If plaintiff was the victim of discrimination, she clearly knew about it when she received the June 21 letter.

In addition, plaintiff was apparently aware that the June 21, 1991 termination decision was final. She was employed for over thirty years in the New York City school system, and she had served as a teacher, guidance counselor, acting high school principal, central office director and tenured assistant principal. Her extensive experience indicates that she was aware of the rules governing the tenure process. Indeed, in her complaint in this case and to the New York State Division of Human Rights plaintiff identified June 21, 1991 -- the date of Superintendent Casey's decision -- as date of the discriminatory act and the date of the most recent discriminatory activity.

CONCLUSION

For the foregoing reasons, defendant's motion to strike plaintiff's jury demand and claim for compensatory and punitive damages is granted.

So Ordered,

JOHN GLEESON
U.S. DISTRICT JUDGE

Dated: February 3, 1997
Brooklyn, New York